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90-201

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COLONIAL VILLAGE, INC.,

Petitioner,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals correctly construe the Fair Housing Act as creating a private cause of action based solely on the fact that none of the approximately ten human models shown in six prototype newspaper advertisements for the petitioner's residential condominium development, which appeared in *The Washington Post* on a total of 32 days between January 1, 1985 and April 26, 1986, were identifiable as black persons? If so, does the Fair Housing Act violate the First Amendment?

2. May the judicially-created "continuing violation" exception be applied to override the period of limitations set forth in the Fair Housing Act, thereby allowing plaintiffs to sue on newspaper advertising claims which accrued prior to the limitations cutoff, where no discrete violation occurred within the statutory period?

3. Consistent with Art. III standing requirements, may an individual newspaper reader, who allegedly incurred "indignation" and "distress" as a result of seeing petitioner's advertising, be allowed to prosecute independent claims for damages, injunctive relief and declaratory relief in federal court, simply because other co-plaintiff organizations are deemed to have standing to litigate their own distinct claims in the case?

PARTIES

In addition to the parties named in the caption of this petition, the parties to the consolidated proceedings in the court of appeals included Mobil Land Development Corporation ("MLDC"), Marvin J. Gerstin and Marvin Gerstin Associates, Inc.

All of the stock of petitioner Colonial Village, Inc. is owned by MLDC, which is a wholly-owned subsidiary of the Mobil Corporation, a publicly-held corporation.

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OCTOBER TERM, 1990

COLONIAL VILLAGE, INC,

Petitioner,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,

Respondents.

Colonial Village, Inc. petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit. In accordance with Rule 29.4(b) of the Supreme Court Rules petitioner notes that 28 U.S.C. §2403(a) may be applicable, in that the constitutionality of the Fair Housing Act, as applied by the court of appeals, is drawn into question, and neither the United States nor any department, office, agency, officer or employee thereof is a party. Certification pursuant to 28 U.S.C. §2403(a) was not made to the Attorney General by the court of appeals.

OPINIONS BELOW

The opinion of the court of appeals, reproduced in the separately printed appendix at App. A, pages 1a-21a, is reported as *Spann v. Colonial Village, Inc.*, 899 F.2d 24. The opinion issued by the district court on May 22, 1987 is reported under the same caption at 662 F.Supp. 541 and reproduced at App. F, pp. 29a-41a. A subsequent memorandum of the district court dated October 13, 1988 is reported at 124 F.R.D. 1 and is reproduced at App. H, pp. 45a-49a.

JURISDICTION OF THIS COURT

The judgment of the court of appeals was entered on March 13, 1990. A timely petition for rehearing was denied by the court of appeals on May 3, 1990. (App. E, 27a-28a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Art. III, sec. 2 of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their Authority; . . .

The First Amendment of the Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

Section 804 of the Fair Housing Act, enacted as Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3604, as amended, provides in relevant part as follows:

> . . . [I]t shall be unlawful—
>
> * * *
>
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

Section 812(a) of the Fair Housing Act, effective at the time the complaint was filed in the district court and then

codified at 42 U.S.C. §3612(a), provided in relevant part that:

> The rights granted by [section 804] may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred. . . .

Section 812(c), 42 U.S.C. §3612(c), at that time provided:

> The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

The provisions of section 812 were subsequently amended by section 8(2) of the Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1633, and replaced by a new section 813, now codified at 42 U.S.C. §3613, providing among other things for a two-year statute of limitations for private civil actions and elimination of the statutory cap on punitive damages. This statutory revision became effective on March 12, 1989, 180 days after its enactment and approval by the President on September 13, 1988. *See* Pub. L. 100-430, sec. 13(a).

FOR JULIE AND ME, 'HAPPILY EVER AFTER' BEGAN IN OUR VILLAGE BY THE CITY.

It's as close to the story book life as we ever thought we'd get. A picturesque little village. Right next door to D.C. in Rosslyn. A private, wooded setting just one mile from the Key Bridge, where we can walk to all the things that make life enjoyable. The stores. The restaurants. Even the Courthouse Metro. And the homes! Quiet and solid. Beautifully designed interiors with new baths and insulated windows. New walls and floor coverings. New plumbing and wiring. New kitchens and appliances. Even a new heat pump system. Take it from us. If you want the real story on the very best of condominium living, you'll find your happy ending in our *Village by the City.* Visit today.

Directions: From Rosslyn, take Wilson Blvd. to right on Rhodes St. and follow signs to the sales office. Or from Lee Highway, go right on Veitch St., then left on Key Blvd. to sales office. Open 11-5 daily, except on Wednesdays. Phone 276-0200. Brokers Welcome 3%.

EQUAL HOUSING OPPORTUNITY

Colonial Village

YOUR VILLAGE BY THE CITY.

STATEMENT

A. Facts.

Petitioner Colonial Village, Inc. ("Colonial") is the owner and developer of a residential condominium project in Arlington, Virginia. From time to time Colonial has commissioned advertisements for its development to be prepared by an outside advertising agency and published in *The Washington Post*. During 1985, three prototypes for such ads were used, appearing in that newspaper a total of 22 times. From January 1 through April 26, 1986, three similar ads were used and appeared a total of ten times. Over this sixteen month period, Colonial ads were published on the average every 15 days, or roughly twice a month, normally appearing in the Saturday real estate section but sometimes in the paper's Friday editions. After April 26, 1986, a fourth prototype ad was added for use in rotation with the other three during the remainder of that year.

The seven ads used during 1985 and 1986 each featured a photograph of a young working person or couple in a social, recreational or commuting setting. Typical of the 1985-1986 advertisements was the prototype reproduced on the preceding page, which appeared in *The Washington Post* on Saturday, April 26, 1986 with the heading:

> **FOR JULIE AND ME,**
> **'HAPPILY EVER AFTER' BEGAN**
> **IN OUR VILLAGE BY THE CITY.**

Under the picture of a couple apparently strolling home from shopping, the text of this ad read as follows:

> It's as close to the story book life as we ever thought we'd get. A picturesque little village. Right next door to D.C. in Rosslyn. A private, wooded setting just one mile from the Key Bridge, where we can walk to all the things that make life enjoyable. The stores. The restaurants.

> Even the Courthouse Metro. And the homes! Quiet and solid. Beautifully designed interiors with new baths and insulated windows. New walls and floor coverings. New plumbing and wiring. New kitchens and appliances. Even a new heat pump system. Take it from us. If you want the real story on the very best of condominium living, you'll find your happy ending in our Village by the City. Visit today.

Also included were directions to the project, its office hours and telephone number. At the bottom of the ad appeared the Colonial Village logo, the "EHO" logo reflecting the developer's compliance with fair housing laws as suggested by the U. S. Department of Housing and Urban Development ("HUD"), 24 C.F.R. §109.30, and the phrases **"EQUAL HOUSING OPPORTUNITY"** and **"YOUR VILLAGE BY THE CITY"** in bold print.

On April 24, 1986, parallel administrative complaints against Colonial, its advertising agency and Colonial's parent corporation were filed with HUD and the District of Columbia Office of Human Rights ("OHR"). The complainants were Girardeau Spann, a black resident of Washington, D.C. who is a professor of constitutional law at Georgetown University Law Center, and two nonprofit advocacy groups, the Metropolitan Washington Planning and Housing Association, Inc., and the Fair Housing Council of Greater Washington. Those complaints alleged that the 31 advertisements for Colonial Village that had appeared in *The Washington Post* during the preceding sixteen months violated section 804(c) of the Fair Housing Act by failing to include any black persons in the photographs. Neither agency has taken any enforcement action to date on those 1986 administrative complaints.

B. District Court Proceedings.

Professor Spann and the two advocacy groups filed suit in the district court, seeking compensatory and punitive

damages as well as injunctive relief and a declaratory judgment against Colonial Village and Mobil Land Development Corporation ("MLDC") on October 23, 1986. Federal subject matter jurisdiction was invoked in the complaint under 28 U.S.C. §§1331, 1337, 1343(4) [*sic*], 2201 and 42 U.S.C. §3612.

The complaint alleged that Colonial violated section 804(c) of the Fair Housing Act because no black human models were shown in its advertisements for the project, although white models were depicted. That fact alone was alleged to indicate an illegal preference based on race.[1] As a result of viewing such ads in *The Washington Post*, plaintiff Spann allegedly "was offended by those ads due to their clear indication of racial preference" and, as a black person, incurred "indignation" and "distress" as a result. The advertising was also alleged to have interfered with both plaintiff organizations' programs to bring about equal opportunities in housing and with their members' rights to receive information about housing "free from indications of racial preference." MLDC was included as a defendant on grounds that, as the corporate parent of Colonial, it "is responsible for the actions and omissions of its subsidiary." The complaint demanded a trial by jury on all issues.[2]

On February 24, 1987, Colonial moved for summary judgment on the Fair Housing Act claims. Colonial did not

[1] The complaint also asserted that advertising for Colonial Village violated the Civil Rights Act of 1866, 42 U.S.C. §§1981 and 1982. The district court's dismissal of this claim for failure to state a claim upon which relief could be granted was affirmed by the court of appeals, and those issues are no longer involved in the case.

[2] The suit against Colonial and MLDC was consolidated by the district court, for purposes of briefing, with a separate, parallel action against the advertising agency employed by Colonial (which was promptly settled and dismissed) and a third similar action brought by the same plaintiffs against Marvin J. Gerstin and Marvin Gerstin Associates, Inc., who have had no relationship to Colonial or MLDC outside of this litigation.

dispute that none of the approximately five human models shown in its three prototype ads used in 1985 and the five models shown in the three similar ads which ran from January, 1985 through April, 1986 were identifiable as black persons, but the motion stressed that plaintiffs were unable to establish that any violation of section 804(c) had occurred within the applicable limitations period.

By the affidavit of its vice president Dale R. McGinley and other evidence filed in support of the motion, including the ads themselves, the company established that during the 180 days preceding October 23, 1986, the day on which the complaint was filed, over 28 percent of Colonial's advertisements appearing in *The Washington Post* featured a black model; that none of Colonial's ads have contained any statement indicating or suggesting a racial preference; and that every Colonial ad since January 1, 1985 included the words "EQUAL HOUSING OPPORTUNITY" and the HUD logotype symbol for nondiscrimination in housing. The McGinley affidavit further established the absence of any discriminatory intent on Colonial's part at any time. Its management did not select models for the advertisements, which was left up to the advertising agency, although it had reviewed and approved the ads before publication. The Colonial management never directed or suggested to the agency that a racial preference be indicated or that models be selected based on their race, which Mr. McGinley swore "would be absolutely contrary to our company policies and purposes." (App. I, 50a-52a). The company in fact remained unaware of any alleged racial imbalance in the models prior to the administrative complaints made to HUD and OHR on April 24, 1986.

These points were reflected in a statement of material facts not in genuine dispute, which Colonial filed with its summary judgment motion pursuant to Local Rule 108 of the district court. (App. I, 52a). Colonial's properly supported motion shifted the burden to plaintiffs to present affirmative evidence of "specific facts" showing a "genuine

issue for trial" under Fed. R. Civ. P. 56(e), sufficient to allow a "reasonable jury" to decide in plaintiffs' favor.[3]

Significantly, although the complaint had originally alleged that Colonial "acted with intent in depicting only white models in its advertisements," the plaintiffs' summary judgment opposition papers expressly—and emphatically—disavowed any effort to demonstrate such intent to establish liability. Thus, for example, in their response to Colonial's Local Rule 108 statement of material facts, plaintiffs declined to challenge the evidence that Colonial had been unaware of any racial imbalance, was not involved in selection of the models and had never caused the advertising agency to indicate racial preference in the ads or to select models based on race.[4] Instead they asserted flatly that, "[t]o establish Colonial Village's liability under the Fair Housing Act *plaintiffs need not show either the discriminatory intent or direct supervision of Colonial Village. . . .*" (App. I, 52a-53a; emphasis added). Under their view of the law, the mere fact that identifiably black persons did not appear in Colonial's series of six newspaper ads, which ran for 16 months in 1985 and early 1986, was alone sufficient to subject Colonial to liability for damages and injunctive relief, even if Colonial had no

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[3] *Waters v. Thornburgh*, 888 F.2d 870, 873 (D.C. Cir. 1989), citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); see also *Lujan v. National Wildlife Federation*, 58 U.S.L.Week 5077, 5082 (U.S., June 27, 1990) (general averments in affidavits opposing summary judgment fail to meet specificity requirement of Rule 56(e)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029 (D.C. Cir. 1988).

[4] Under the local district court rule, factual assertions contained in the movant's statement of undisputed facts supporting a motion for summary judgment may be taken as admitted if not specifically controverted in a statement of genuine issues filed by the opposing party. U.S. District Court, District of Columbia, Rule 108(h); see *Twist v. Meese*, 854 F.2d 1421, 1423-25 (D.C. Cir. 1988), *cert. denied*, 106 L.Ed.2d 612 (1989).

part in selecting the models and lacked any discriminatory purpose.[5]

The district court granted summary judgment in favor of Colonial and also granted the Gerstin defendants' parallel motion for summary judgment on the claims under section 804(c) of the Fair Housing Act. (App. G, 43a). Focusing on the period commencing on April 26, 1986, the 180th day preceding the filing of the complaint, consistent with the 180-day limitations provision then contained in the Fair Housing Act, the district court found that over 28 percent of the Colonial Village ads appearing in *The Washington Post* from that day until the complaint was filed featured a black model. (App. F, 32a, 39a). Furthermore, the district court found:

> None of Colonial's ads, *at any time*, has contained language indicating or suggesting a racial preference. To the contrary; *all of its ads* in *The Post* have included the phrase "Equal Housing Opportunity" as well as a related logo.

Id., 32a (emphasis added). The district court declined to construe section 804(c) as *requiring* the use in advertising of models of a particular race or sex in particular proportions, holding that this would lead to impracticable and absurd results that Congress could not possibly have intended and would have a "chilling effect . . . on advertisers' ability and desire to advertise, implicating First Amendment concerns." (App. F, 37a). In light of these concerns, it held, an element of discriminatory intent had to be proved in a section 804(c) action, either by direct evidence or by inference to be drawn from extrinsic or historical evidence:

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[5] Plaintiffs also filed their own motion for judgment on the pleadings or for summary judgment, based solely on the absence of black models in Colonial's ads that appeared in *The Washington Post* during a sixteen month period from January 1, 1985 through April 26, 1986, again disclaiming any attempted proof of discriminatory intent.

> When the Congress prohibited advertisements that indicate a discriminatory preference, it could only have intended that the preference be either obvious from the ad itself . . . or that such preference be ascertained through extrinsic circumstances. . . . Usually the proof of such extrinsic circumstances will implicate an element of discriminatory intent. . . . [*A*]*bsent a showing of intent to indicate a racial preference or of other extrinsic circumstances revelatory of a racial preference, real estate advertisements do not violate the Fair Housing Act merely because models of a particular race are not used in one ad or a series of ads.*

Id. (emphasis added).

During the statutory limitations period, the district court ruled, the defendants did not possess the requisite discriminatory intent, and "indeed, neither defendant's ads or ad campaigns indicated a racially discriminatory preference during that period under any standard." (App. F, 39a). This conclusion was buttressed by findings that the percentage of Colonial ads featuring black models actually exceeded the proportion of black persons in the Washington metropolitan area population and that Colonial in April, 1986 had adopted a written policy specifically requiring nondiscrimination in the selection of models for its advertising. "In brief," the district court held, "there was no conceivable violation by either defendant during any period not barred by the statute of limitations." (App. F, 39a).

The plaintiffs immediately noted an appeal, which was dismissed by the court of appeals as premature. (App. B, 22a-23a). Subsequently the district court entered an order on October 13, 1988, denying the motion of defendant MLDC to dismiss the complaint against it for failure to make timely service of process under Fed. R. Civ. P. 4(j) or to quash service of process. (App. H, 49a). Plaintiffs

thereupon filed a new notice of appeal in their action against Colonial on November 10, 1988, which was docketed in the court of appeals as No. 88-7257 and consolidated there with plaintiffs' appeal in the Gerstin case, D. C. Cir. No. 88-7260.

C. The Decision of the Court of Appeals.

The court of appeals reversed the district court's award of summary judgment on the claims under section 804(c). First addressing the issue of standing, the court held that the two plaintiff organizations had alleged interference and detriments to their programmatic interests sufficient to meet the injury-in-fact, causation and redressability tests for Art. III standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). (App. A, 4a-12a). No prudential standing analysis was deemed necessary, again under authority of *Havens*. (*Id*). The appeals panel declined to decide whether the individual plaintiff had standing to litigate his personal claims for compensatory and punitive damages and other relief or whether the organizations possessed standing to pursue claims as representatives of their members, holding that these determinations were not necessary in light of its conclusion that the organizations had standing to proceed on their own behalf. (App. A, 9a n.2).

Turning to the merits, the court of appeals agreed that summary judgment would have been proper if the 180-day pre-complaint period were the appropriate time frame for analysis. (App. A, 20a). But, the court stated, the complaint against Colonial focused on the company's advertising from January, 1985 to April, 1986. Throughout that sixteen month period, six Colonial Village ads appeared in *The Washington Post* a total of 32 times; each of those six ads featured one or two human models, none of whom was identifiably black. The last of what plaintiffs alleged was the "long stream of all white ads" during this period appeared on April 26, 1986, exactly 180 days before the complaint was filed. Based on this, the district court was

reversed on grounds that it erroneously failed to consider the prelimitations period advertising. According to the court of appeals' decision, the appearance of the final so-called "all white" ad for Colonial on April 26, 1986—the last possible day within the limitations period—brought into play the continuing violation doctrine described in *Havens Realty Corp. v. Coleman*, 455 U.S. at 380-381, thereby overriding the statutory 180-day limit and opening up all of the company's advertising since January 1985 for attack. (App. A, 19a-20a).

The appellate court found it "highly unlikely" that any one of the Colonial ads, standing alone, would violate section 804(c)—even without an identifiably black model having been included. (App. A, 19a n.6). The case is thus distinguished in a critical respect from the situation in *Havens*, where the specific conduct relied on to invoke the continuing violation doctrine was itself a clear violation of the Fair Housing Act.

Colonial argued in the appeal that a discrete violation of law had to have occurred within the limitations period to bring the continuing violation doctrine into play, based on *Lorance v. AT&T Technologies, Inc.*, 104 L.Ed.2d 961 (1989), but the court of appeals did not address this point or even mention *Lorance*. Instead it cited its own pre-*Lorance* decision in *McKenzie v. Sawyer*, 684 F.2d 62 (D.C. Cir. 1982), for the proposition that a "defendant's conduct before the actionable period" must be examined "to show the violative character of defendant's conduct in that period," holding further that the district court erred by failing to make such an inquiry. (App. A, 19a n.6). The decision, however, did not explain why such prelimitations conduct would have been relevant in this case, where the undisputed evidence submitted by Colonial established the racially neutral character of each ad on its own as well as the complete absence of any discriminatory intent or even awareness of a racial imbalance in the selection of advertising models at any time, within or without the lim-

itations period; and the plaintiffs submitted no conduct evidence beyond the bare fact that identifiably black models were not included in the six prototype ads that appeared during the prelimitations period.

Moreover, the evidence of violation relied on by plaintiffs was merely the *appearance* of the last challenged ad in the newspaper on the 180th day prior to their complaint, which fell well short of proof that Colonial took any *action* to violate the law within the limitations period. It has never been suggested that the company could have contacted *The Washington Post* on the morning of April 26, 1986 and made arrangements for its ad to appear that very day. Obviously those arrangements had to have been concluded at some point *before* the day on which the ad actually came out. The court of appeals ignored this shortfall in plaintiffs' evidence and did not explain how the *Havens* doctrine could apply at all under these facts.

As in the district court, the plaintiffs continued in the court of appeals to adhere to their position that no proof of discriminatory intent ever need be shown in an action under section 804(c). Unlike the district court, the court of appeals seems to have agreed. Although this issue was never addressed squarely in its opinion, the most reasonable interpretation of the court of appeals' decision in light of the record is that preferential or discriminatory intent was deemed to be not a necessary element of a section 804(c) case against a real estate advertiser. (See discussion at App. A, 10). Had the court of appeals agreed with the district court on this point, it would have had to affirm the summary judgment under Rule 56 because of the plaintiffs' failure to adduce any evidence of unlawful intent, when that issue was squarely raised by Colonial's summary judgment motion. *Lujan v. National Wildlife Federation*, *supra*, 58 U.S.L.Week 5077, 5080-81.

Finally, while the district court had noted that judicial construction of section 804(c)'s constraints on advertising

necessarily implicates First Amendment concerns, the court of appeals ignored that aspect of the case. Its reversal and remand in effect sent the case back for a jury trial based on nothing more than the appearance, over a sixteen month period, of a handful of ads in which pictures of black models happened not to be included. With no evidence of discriminatory intent being required, Colonial's facially-neutral ads may now subject it to liability if a jury in the District of Columbia finds that they can be read as racially preferential or discriminatory. Despite the obviously chilling effect this construction is likely to have on advertisers, the court of appeals never mentioned the First Amendment at all.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Adopted an Illogical and Impermissible Construction of the Fair Housing Act Which, If Allowed to Stand, Would Violate the First Amendment as a Result of Overbreadth and Vagueness.

The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601 *et seq.*, stands among the most important social legislation ever enacted by Congress. It not only outlaws racial discrimination in housing throughout the nation but even prohibits statements from being made which indicate racial preferences or discrimination in the sale or rental of housing, creating an important area of potential conflict with First Amendment interests. This case calls upon the Court to resolve such a conflict or to avoid it through proper statutory interpretation.

By its terms the Fair Housing Act does not address the selection of human models shown in real estate advertisements, nor does it create any express requirements relating to the models' racial and other minority characteristics. All the statute says is that an advertisement may not

indicate "any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination." Sec. 804(c), 42 U.S.C. §3604(c).

The decision of the court of appeals interprets this provision so broadly that a perceived racial imbalance among the human models appearing in an advertisement or advertising campaign may, without more, be a basis for the imposition of liability. All that must be shown to establish a violation of section 804(c), according to its decision, is that the "natural interpretation" of a developer's advertising to a "reasonable reader" is to indicate a racial preference. (App. A, 10a.). The D.C. Circuit leaves it up to the jury's discretion in each case to decide whether or not an advertiser has committed a violation by having too many persons of one race and too few of another shown in its advertising. The ruling provides no standards for determining when a violation may occur, and the sanctions potentially available upon a finding of violation are severe. This construction of the statute raises serious First Amendment issues affecting advertisers, as well as newspapers and other advertising media, that could and should have been avoided.

Each of the 1985 and 1986 Colonial ads, standing alone, was facially neutral and nondiscriminatory. Each one alone was a nondeceptive, proper and lawful form of speech protected by the First Amendment.[6] But when the pho-

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[6] See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). In that case the Court specifically focused on the nonverbal and pictorial aspects of advertising, holding that "commercial illustrations are entitled to First Amendment protections afforded verbal commercial speech. . . ." *Id.* at 647. Unlike the situation in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), Colonial's ads cannot logically be viewed as soliciting "illegal" commercial activity, because the element of discriminatory intent found to have been present in *Pittsburgh Press* is absent here.

tographs appearing in these separate ads were considered in the aggregate, the court of appeals found an actionable civil rights claim sufficient to go to the jury.

In short, the holding means that *lawful and protected speech may become illegal merely as a result of its repetition.* Congress certainly did not have this absurd result in mind when it enacted the Fair Housing Act in 1968.

In *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), the Fourth Circuit first addressed the complex interplay between the restrictions on advertising imposed under the Fair Housing Act and the First Amendment. *Hunter* was an action brought by the Justice Department against a newspaper to enjoin its publication of classified ads for rental housing in a "white home." Imposing a duty on the publisher to reject ads that violate the act was held not an unconstitutional burden because of the obvious intent element that is integral to the underlying violation:

> Finally, a newspaper publisher can easily distinguish between permissible and impermissible advertisements in discharging his duty to reject those that violate §3604(c). . . . [A] publisher can readily determine from the face of an advertisement whether it is intended to express a discriminatory preference. However the language of the advertisement is couched, the purpose of an advertiser who wishes to publish an advertisement in violation of the Act is to communicate his intent to discriminate and a newspaper publisher can divine this intent as well as any of his readers.

459 F.2d at 213. In affirming the trial court's finding of violation, the *Hunter* court held that "the indication of a racial limitation is precisely what the [advertiser] intended when he used the words 'white home'." *Id.*, 214. The D.C.

Circuit's decision appears to conflict with the decision of the Fourth Circuit in *Hunter* by disregarding the necessity for proof of the defendant's discriminatory intent.[7]

The threat of litigation and potential liability arising under the court of appeals' construction of section 804(c) would be severely intimidating to all but the most dauntless advertisers. Rather than attempt to determine the relevant market within which its ads will circulate and the respective proportions of various minorities in that market area to insure that models of each identifiable minority are fairly represented in its ads, most advertisers will simply avoid using human models at all lest they be attacked in court.[8] Creative work will inevitably be stifled by the lack of any standards providing guidance as to what a jury may later find racially preferential or prejudicial; one can imagine liability being imposed for otherwise neutral ads featuring depictions of George Washington, Thomas Jefferson or other "all white" founding fathers, or for not including enough hispanics, orientals or Sikhs.

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[7] The decision below cites *Saunders v. General Services Administration*, 659 F.Supp. 1042, 1058 (E.D. Va 1986), in support of its view that the Fair Housing Act is violated if a "reasonable reader" [*sic*; the term used in original text was "ordinary reader"] finds the defendant's ads to indicate racial preference without any showing of intent. However, the suggestion in *Saunders* that intent is unnecessary is merely dictum, since the district court in that case specifically found that the advertiser "intended to indicate preferences for certain types of tenants" and directed that black models not be depicted in the development's swimming pool.

[8] The respondents and others working in concert with them have already created a profitable cottage industry of suing real estate developers, advertising agencies and newspapers under section 804(c). *See, e.g., Spann v. Carley Capital Group*, 734 F.Supp. 1, 4-9 (D.D.C. 1989) (consent order providing for $325,000 payment by developers and advertising agencies to plaintiff group).

The point here is not that such liability will necessarily be imposed, but rather that the open-ended threat of such liability will have a deterrent and chilling effect on advertisers who have no discriminatory purpose whatever. *Long Island Vietnam Moratorium Committee v. Cahn*, 437 F.2d 344, 350 (2d Cir. 1970), *aff'd*, 418 U.S. 906 (1974) (where statutory proscription is vague, "a layman might refrain from conduct that is protected by the First Amendment for fear of coming too close to the line"). But if the court of appeals' statutory construction was correct, and liability arises when a jury determines, after the fact, that newspaper advertising was illegal solely because it could convey an improper message to a "reasonable reader," then the lack of comprehensible and explicit standards should render the act's advertising restrictions void for vagueness and overbreadth. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (vagueness test "applies with particular force in review of laws dealing with speech"); *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

Colonial submits that the statutory construction applied by the district court in this case (and earlier by the Fourth Circuit in *United States v. Hunter*), which accommodates the First Amendment concerns, is the better approach, and the construction adopted by the court of appeals is seriously flawed. Under the district court's view, a violation cannot be found without some proof of discriminatory intent, either obvious on the face of the advertising itself (*e.g.*, "white home") or fairly inferable from extrinsic circumstances.[9] *Accord, Housing Opportunities Made Equal*

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[9] This assumes that aggregation of advertisements that appear over an extended period is permissible under section 804(c). A narrower but entirely plausible interpretation, based on the precise wording of the statute which covers only the singular publication of "any notice, state-

v. The Cincinnati Enquirer, Inc., 731 F.Supp. 801, 804 (S.D. Ohio 1990), *appeal pending*, No. 90-3176 (6th Cir.). Because of the enormous significance of this issue for enforcement of the Fair Housing Act as to thousands of advertisers, advertising agencies and newspapers throughout the country and the potentially chilling impact that the court of appeals' ruling has on First Amendment interests, the Court should take this opportunity to resolve the matter.

II. The Decision of the Court of Appeals, Expanding the "Continuing Violation" Exception to Override the Congressionally-Mandated Statute of Limitations Even Where No Discrete Violation of Law Occurred Within the Applicable Period, Is in Conflict With Decisions of This Court.

The decision of the panel below is based on a novel and unduly expansive interpretation of the "continuing violation" doctrine, which was applied by the court of appeals to overcome the 180-day period of limitations set forth in 42 U.S.C. § 3612(a). In applying the continuing violation exception from the statutory time bar, the court of appeals relied on the articulation of that concept for purposes of the Fair Housing Act in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). However, *Havens* is significantly distinct from this case and does not support the appeals court ruling. The *sole* basis for invoking the doctrine against Colonial was an advertisement which appeared in *The Washington Post* on Saturday, April 26, 1986—exactly 180 days prior to the filing of the complaint on October 24, 1986. Plaintiffs asserted the April 26 ad was part of a

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ment, or advertisement", would not permit cumulative evaluation of a series of ads in the first place. Supporting this construction is the point that Congress could have added a phrase such as "or any series of advertisements" to this provision, if it had intended an aggregation approach.

pattern of racially preferential advertising. Standing alone, however, the April 26 ad (p.4, *supra*) is inoffensive and racially neutral. The situation is therefore entirely different from *Havens*, where "the last asserted occurrence" of the alleged pattern of violations was *itself* an overt act of illegal discrimination. (See App. A, 19a n.6, acknowledging this critical distinction.) The decision of the court of appeals thus expands the doctrine well beyond what was developed and approved in *Havens*

With its expansive application of the continuing violation theory to overcome the bar of limitations, the court of appeals' decision conflicts with a series of cases in which this Court has articulated the limits and conditions of using that concept to revive discrimination claims otherwise foreclosed by applicable statutes of limitations. *Lorance v. AT&T Technologies, Inc.*, 104 L.Ed.2d 961 (1989); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). Although an ad for Colonial picturing a white couple did appear in the newspaper on the 180th day before the complaint, that was simply the automatic consequence and effect of campaign planning and media placement decisions and arrangements that necessarily occurred prior to that date; it would obviously be impossible for the defendant to arrange on a Saturday morning for a large display ad to appear in the newspaper that same morning. Whatever action the company took—whether legal or illegal under the Fair Housing Act—was over and done with by the time the April 26 ad was printed. The case thus should be controlled by *Lorance* and earlier Supreme Court decisions, which refused to apply continuing violation exceptions to revive statutory civil rights claims otherwise barred by limitations.

In *Lorance v. AT&T Technologies, Inc.*, the plaintiffs had been subjected to alleged discriminatory modification of their employer's seniority system but failed to commence legal action in a timely manner. 104 L.Ed.2d 961,

969. As a result of the later enforcement of the seniority plan, which itself was facially neutral, the plaintiffs suffered competitive detriments in their employment within the statutory limitations period. They argued that the continuing violation concept should allow them to proceed, because the facially nondiscriminatory seniority system had continuing adverse effects arising from its historically discriminatory genesis. The Court rejected this argument, emphasizing the critical difference between the time of the *discriminatory acts* versus the time when the *consequences* of those acts became "most painful." *Id.*, 971-72. Likewise in *Delaware State College v. Ricks*, the Court emphasized again that the critical issue is whether a *violation* occurred within the limitations period, as distinct from the appearance or occurrence of one or more effects of a previous discrimination; the focus must be "upon the time of the discriminatory acts, not upon the time at which the consequences of the acts become most painful." 449 U.S. at 258 (citations omitted); *accord*, *Chardon v. Fernandez*, 454 U.S. 6, 9 (1987). And in *United Air Lines v. Evans* it was held that, while the employer's seniority system did have a continuing *impact* on the plaintiff's compensation, "the critical question is whether any present *violation* exists." 431 U.S. at 558 (emphasis in original). Even though her employer's policies gave continuing effect to a past act of discrimination, the plaintiff's claim based on the original discriminatory termination was barred, and that act was held to have "no present legal consequences." *Id.*

The import of these decisions is clear: time-barred discrimination claims do not revive simply because consequences of previous bad acts come to light or are felt within the limitations period. There must be at least one new incident of overt and palpable discrimination occurring within the applicable period in order to invoke the continuing violation doctrine.[10] *Malhotra v. Cotter & Co.*, 885

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[10] *McKenzie v. Sawyer*, *supra*, cited by the court of appeals to support

F.2d 1305, 1310 (7th Cir. 1989). That is consistent with *Havens*, where a discrete violation within the 180-day statutory period was the basis for reopening barred claims.

There is no evidence whatever that any act of discrimination was committed by Colonial within 180 days before the complaint was filed. The plaintiffs' continuing violation claim was based on a single advertisement (reproduced at page 4, *supra*), which appeared in the paper on the morning of the 180th day. It is clear that the April 26, 1986 ad did not itself violate the Fair Housing Act: the district court so held, and its ruling on that point was not disturbed by the court of appeals. (App. F, 39a; App. A, 19a n.6). It was only by coupling this facially neutral ad with previous publications of the same and similar ads that the plaintiffs and the court of appeals professed to find a theoretical violation of the Fair Housing Act. That approach cannot be reconciled with the continuing violation rulings of this Court, especially since any alleged illegal conduct by Colonial necessarily occurred some time before the day on which the subject advertisement was actually printed in *The Washington Post*.

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application of the continuing violation doctrine even where "no single act of the defendant would likely have violated Title VII" (App. A, p. 19a n.6), holds only that plaintiffs "need not show that the *entire violation* occurred within the actionable period" and there must be "a series of related *acts, one or more* of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period". 684 F.2d at 72, quoting *Valentino v. United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982) (emphasis added). While the *McKenzie* opinion is somewhat opaque, the court does not appear to have held in that case that no violation need have occurred within the limitations period. It stated merely that prelimitations statistical evidence "can be used as indicative of [defendant's] practices continuing within the actionable period under Title VII", 684 F.2d at 73; the violative conduct at issue there included continued hiring and promotion actions affected by the employer's discriminatory animus. *Id.*, 70. However, if the court of appeals was correct in its description of the *McKenzie* holding on proof of a continuing violation, that case would appear to be of questionable validity after *Lorance*.

The only thing that actually happened within the limitations period was simply the consequence of pre-limitations period conduct. This Court should clarify that the Fair Housing Act's statute of limitations is not displaced by the continuing violation theory in that circumstance.

III. By Misapplying Questionable Precedent From This Court's *Arlington Heights* Decision and Ignoring More Recent and Apparently Controlling Authority, The Court of Appeals Improperly Allowed a Party With No Article III Standing to Remain as a Litigant in the Case.

During the past three decades, few issues of Constitutional law have proved more troublesome and complex than Art. III standing. Spann, *Expository Justice*, 131 U.Pa.L.Rev. 585, 618-27 (1983). This case presents an opportunity for the Court to eliminate confusion stemming from an apparent discrepancy between a footnote in the case of *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 264 n.9 (1977), where individual and corporate plaintiffs were allowed to continue as parties in federal court litigation without separate evaluation of their standing, and the principle that constitutional standing requirements must be separately applied to each litigant seeking relief.

The court of appeals' decision holds that, because the two plaintiff organizations were found to have alleged injury sufficient to support their own standing, evaluation of the standing of the one individual plaintiff was not necessary. (App. A, 9a n.2). This ruling, allowing the individual plaintiff to stay on as a party in the litigation despite his manifest lack of any distinct and palpable injury, appears to conflict with the decision in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), and other standing decisions.

The lower court's reliance on footnote 9 in the *Arlington Heights* case to support its holding that the individual plaintiff's standing could properly be finessed because the *other* plaintiffs have standing, while superficially plausible, cannot withstand analysis. *Arlington Heights* is distinguishable on its facts, since it involved *only* claims for declaratory and injunctive relief asserted jointly on behalf of three individual plaintiffs and a real estate development corporation, but *not* individual claims for punitive or compensatory damages. 429 U.S. at 256-58. This Court has previously held that, for standing purposes, suits for damages must be viewed differently from those seeking only declaratory or equitable relief. *Warth v. Seldin*, 422 U.S. 490, 515-516 (1975); *cf. Secretary of Interior v. California*, 464 U.S. 312, 319 n.3 (1984), holding that certain plaintiffs' standing need not be addressed, since the State of California had standing to seek declaratory and injunctive relief against proposed federal action,and the position of the other plaintiffs "was identical to the State's"; *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (unnecessary to consider standing of Congressional plaintiffs and union, where one plaintiff clearly had standing to sue for declaratory relief); *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981) (declaratory and injunctive relief sought).

In contrast to *Arlington Heights*, the individual plaintiff in this case is not a mere tagalong. He asserts independent claims, in his own name and behalf, for compensatory and punitive damages as well as other relief against the defendants. Yet the only basis for standing alleged by this plaintiff is that he was "offended" by the real estate ads that he saw in *The Washington Post* and "incurred indignation" and "distress" as a result. (App. A, 9 n.2). He never applied to purchase or rent a unit in Colonial Village, has not had contact of any kind with the developer and, as a long time resident of Washington, D.C., does not claim to live in or near the neighborhood in which the project is located in Virginia.

It is settled that "psychological consequences presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III." *Valley Forge*, 454 U.S. at 485. Even "stigmatic injury" is insufficient, unless the plaintiff has been "personally subject to discriminatory treatment" regarding some concrete interest. *Allen v. Wright*, 468 U.S. 737, 757 n.22 (1984). Being angered or upset by what one sees in a newspaper, absent any kind of defamation or discrimination directed personally against the plaintiff, is simply not enough for Constitutional standing.[11] See Spann, *Expository Justice, supra*, at 624-25 and n.176.

This Court in *Valley Forge* underscored that parties who lack Article III standing "may not litigate as suitors in the courts of the United States." 454 U.S. at 475-76 (footnote omitted). In *Warth v. Seldin, supra*, 422 U.S. at 498, the Court earlier demonstrated that standing must be evaluated for each party and each particular issue, stating that, "[i]n essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." This determination always depends on whether a particular plaintiff has alleged a sufficient basis "to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's

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[11] Cases under Title VII of the 1964 Civil Rights Act, which was the model for Title VIII and deals with discriminatory advertising for employment in terms almost identical to those used in section 804(c) for real estate advertising, see 42 U.S.C. §2000e-3(b), have come to the same conclusion. *Banks v. Heun-Norwood*, 566 F.2d 1073 (8th Cir. 1977); *Hailes v. United Air Lines*, 464 F.2d 1006, 1008 (5th Cir. 1972) ("a mere casual reader" of discriminatory advertising prohibited by Title VII lacks statutory standing; plaintiff "must be able to demonstrate that he has a real, present interest in the type of employment advertised" and "that he was effectively deterred by the improper ad from applying for such employment"). The court of appeals was itself openly and properly skeptical that Congress would have intended the Fair Housing Act to afford relief to such a plaintiff, even assuming the Constitution would allow it. (App. A, 9a n.2).

remedial powers on his behalf." 422 U.S. at 498-499 (emphasis in original text; citations omitted). Neither *Valley Forge* nor *Warth* involved the precise issue raised here, but the strength of the Court's statements as to the Constitutional incapacity of plaintiffs who lack standing to litigate in federal courts leaves no room for an implied piggyback exception based on some other plaintiff's standing.[12]

In *Havens Realty Corporation v. Coleman*, *supra*, 455 U.S. at 374-75, standing was similarly evaluated on a party-by-party, issue-by-issue basis; those found inadequate for Art. III purposes, such as the claim asserted by a "tester" plaintiff under the Fair Housing Act who was given only accurate information regarding the availability of rental housing, were dismissed from the case.[13] Likewise in *Glad-*

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[12] The related issue of whether a party who has no Art. III standing may be permitted to intervene and participate as a party in litigation before the district court under Fed.R.Civ.P. 24(a)(2), in alignment with another qualified party, was expressly reserved in *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986). See also *Sanduviches, Inc. v. Wendy's International, Inc.*, 822 F.2d 707, 710 (7th Cir. 1987), discussing the effect of consolidation on whether Art. III standing analysis is required as to all plaintiffs, another issue potentially impacted but not raised directly by this case.

[13] Citing *Havens*, 455 U.S. at 377-78, the court of appeals asserted that it "could not resolve" the individual plaintiff's standing without a remand permitting him to amend the complaint or to supplement the record in the district court. (App. A, 9 n.2). This exemplifies the panel's overall confusion on standing requirements. While *Havens* did allow such supplementary pleading and proof on remand as to the plaintiffs' standing, that occurred in the context of an ambiguous complaint and emerging doctrine regarding "neighborhood" standing. *Accord*, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 112-13 n.25 (1979). Here the complaint is not ambiguous, and the individual plaintiff, a District of Columbia resident, has not asserted neighborhood injury as entitling him to sue a Northern Virginia developer over its newspaper advertising. This Court has frequently dismissed parties and claims outright for want of standing without remands for further elaboration, and the court of appeals was not precluded from doing so here, based

stone, Realtors v. Village of Bellwood, 441 U.S. 91, 112-13 n.25 (1979), two plaintiffs who had inadequately alleged a basis for standing were dismissed from the case, while other plaintiffs who made sufficient allegations were allowed to stay in. *See also FW/PBS, Inc. v. Dallas*, 107 L.Ed.2d 603, 621-25 (1990) (plaintiffs held to have standing to assert certain claims but not others); *United States v. Alabama*, 828 F.2d 1532, (11th Cir. 1987), *cert. denied, sub nom. Board of Trustees of Alabama State University v. Auburn University*, 101 L.Ed.2d 894 (1988) (entities precluded from asserting claims for lack of standing, while other parties had standing to proceed for themselves and as class representatives); *League of Women Voters v. Nassau County Board of Supervisors*, 737 F.2d 155 (2d Cir. 1984), *cert. denied, sub nom. Schmertz v. Nassau County Board of Supervisors*, 469 U.S. 1108 (1985) (individual and organizational plaintiffs dismissed for lack of standing despite presence of other plaintiffs with standing); *Gonzales v. City of Peoria*, 722 F.2d 468, 481 (9th Cir. 1983) (eight plaintiffs dismissed for lack of standing to seek equitable relief from alleged constitutional violations, while three others with standing allowed to proceed).

The court of appeals' decision permitting the individual plaintiff to remain as a party and assert his private claims for damages cannot be reconciled with the statements of this Court in *Valley Forge, Warth* and other standing cases. On the other hand this Court has itself been the source of confusion, arising from the *Arlington Heights* footnote as well as similar rulings in declaratory relief and injunc-

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on the patently inadequate standing allegations in the complaint. See *Lujan v. National Wildlife Federation, supra*, 58 U.S.L.Week at 5083-84 (belated submissions to bolster inadequate allegations and affidavits on standing need not be considered in summary judgment proceedings); *Warth v. Seldin, supra*, 422 U.S. at 508, 518 (plaintiff's threshold responsibility is "clearly to allege facts demonstrating that he is a proper party to invoke . . . exercise of the court's remedial powers"); *accord, Whitmore v. Arkansas*, 109 L.Ed.2d 135, 145 (1990); *FW/PBS, Inc. v. Dallas*, 107 L.Ed.2d 603, 622 (1990).

tive actions such as *Secretary of Interior v. California* and *Bowsher v. Synar, supra*, and the Court should take this opportunity to clarify the rule. Especially where punitive and compensatory damages are demanded by a plaintiff with no cognizable claim to standing, the more recent decision in *Valley Forge* should have precedence over the *Arlington Heights* footnote.

On a Constitutional level, the federal courts are simply not empowered to hear claims for damages and other relief asserted by any party who lacks standing in his own right; and this is important on a practical level as well, since the presence and participation of additional parties without an objective stake in the controversy (other than hope for a windfall award of damages) is likely to affect the costs and logistics of the litigation and could affirmatively impede settlement prospects. The need to apply Art. III standing analysis is especially great in this case, where First Amendment interests are being directly attacked, and the plaintiff professes to be no more than a distressed newspaper reader.

Because the individual plaintiff did not allege or prove injury to himself sufficient to invoke federal judicial power under Art. III, this Court should make clear that he cannot be permitted to litigate his claims in the federal courts.

CONCLUSION

For the reasons stated above, a writ of certiorari should be issued to review the judgment of the court of appeals.

Respectfully submitted,

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Nos. 90-201
90-202

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COLONIAL VILLAGE, INC.,
Petitioner,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

MOBIL LAND DEVELOPMENT CORPOPORATION,
Petitioner,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

MARVIN J. GERSTIN and MARVIN GERSTIN ASSOCIATES, INC.,
Petitioners,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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APPENDIX TO PETITIONS

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 30, 1990 Decided March 13, 1990

No. 88-7257

GIRARDEAU A. SPANN, *et al.*,
APPELLANTS

v.

COLONIAL VILLAGE, INC., *et al.*

No. 88-7260

GIRARDEAU A. SPANN, *et al.*,
APPELLANTS

v.

MARVIN J. GERSTIN, *et al.*

Appeal from the United States District Court
for the District of Columbia

(Civil Action Nos. 86-2917 & 86-3196)

Niki Kuckes, with whom *William H. Jeffress, Jr.*, *David G. Welbert* and *Kerry Alan Scanlon* were on the brief, for appellants.

Reuben B. Robertson for appellees, Colonial Village, Inc. and Mobil Land Development Corporation in No. 88-7257.

Peter L. Sissman for appellees, Marvin Gerstin Associates and Marvin Gerstin in No. 88-7257 and No. 88-7260.

Before: WALD, *Chief Judge*, RUTH B. GINSBURG and WILLIAMS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RUTH B. GINSBURG.

GINSBURG, RUTH B., *Circuit Judge*: Plaintiffs-appellants seek to pursue claims that real estate advertisements placed by defendants-appellees featuring white models to the exclusion of black models violated the Fair Housing Act of 1968 (FHA), 42 U.S.C. §§ 3601-31. The district court held the claims time-barred. We reverse that determination and remand for further proceedings.

The appeal involves consolidated actions against two unrelated sets of defendants. In the first action, commenced in October 1986, the co-defendants are Colonial Village, Inc. (Colonial), owner and manager of a residential condominium in Arlington, Virginia, and Mobil Land Development Corporation (MLDC); Colonial is wholly owned by MLDC which, in turn, is wholly owned by the Mobil Corporation, a publicly-held corporation. In the second action, commenced in November 1986, the co-defendants are Marvin J. Gerstin and the advertising agency he is alleged to own and control, Marvin Gerstin Associates, Inc. Both sets of defendants are charged with running discriminatory ads regularly in *The Washington Post* from January 1985 through the spring of 1986.

Plaintiffs are Girardeau A. Spann, a black resident of the District of Columbia, the Fair Housing Council of Greater Washington, and the Metropolitan Washington

Planning & Housing Association. Both organizational plaintiffs are non-profit corporations dedicated to ensuring equality of housing opportunity through education and other efforts. Requesting injunctive relief and damages, plaintiffs rely primarily on section 804(c) of the FHA, which declares it unlawful

> [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make such preference, limitation, or discrimination.

42 U.S.C. § 3604(c). Plaintiffs additionally assert 42 U.S.C. §§ 1981, 1982 in support of their claims.

The procedural course of this litigation has not been smooth. We describe it summarily. After consolidating the two cases in January 1987, the district court scheduled briefing on dispositive motions. In May 1987, that court ruled for defendants 1) dismissing for failure to state a claim upon which relief can be granted plaintiffs' pleas under 42 U.S.C. §§ 1981, 1982, and 2) granting summary judgment striking out the FHA claims as time-barred. *Spann v. Colonial Village, Inc.*, 662 F.Supp. 541 (D.D.C. 1987).

Plaintiffs' appeal from the district court's May 1987 decision was aborted when Colonial moved in this court to dismiss for want of the requisite finality. Colonial pointed out that the district court had left unaddressed co-defendant MLDC's objection that MLDC was neither properly served nor amenable to service in the District of Columbia. A motions panel of this court, in response to Colonial's plea, dismissed the appeal "without prejudice for lack of a final order under Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291." *Spann v. Colonial Village, Inc.*, Nos. 87-7118 & 87-7119 (D.C. Cir. Apr. 6, 1988).

The district court then endeavored to "make[ ] the judgment in these cases final." In an October 1988 deci-

sion, that court resolved two matters: (1) it denied MLDC's motion to dismiss or quash service of process; and (2) it dismissed the Gerstin defendants' motion for sanctions under FED. R. CIV. P. 11. *Spann v. Colonial Village, Inc.*, 124 F.R.D. 1, 2 (D.D.C. 1988). As to the former, the district court concluded that, because MLDC was notified of the suit through service on Colonial, its subsidiary, "service was properly effected on [MLDC]." *Id.* at 3. On sanctions, the district court found the Gerstins' application "frivolous," because plaintiffs' assertions had a "reasonably defensible basis in fact and law." *Id.*

Plaintiffs once again appeal. We take up first the question of standing and explain why the organizational plaintiffs meet that threshold requirement. We next address the timeliness of the appeal, and the issue of personal jurisdiction over MLDC. Finally, we consider the vitality of the claims in suit, and hold that the FHA claims were not pursued too late.

Standing

The initial issue in these cases is whether plaintiffs possess standing to invoke the jurisdiction of the federal courts. No "prudential standing" inquiry is in order, however, because Congress intended standing under the Fair Housing Act to extend to the full limits of Article III. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). We therefore consider only core Article III standing.

The plaintiff organizations, the Metropolitan Washington Planning & Housing Association (MWPHA) and the Fair Housing Council of Greater Washington (FHC), assert standing to sue on their own behalf, and we turn now to those assertions. An organization has standing on its own behalf if it meets the same standing test that applies to individuals. The organization must show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

Accordingly, just as an individual lacks standing to assert " 'generalized grievances' about the conduct of Government," *see Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 217 (1974), so an "organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 (1976) (citing *Sierra Club v. Morton*, 405 U.S. 727, 738-40 (1971)); *see Capital Legal Found. v. Commodity Credit Corp.*, 711 F.2d 253, 255 (D.C. Cir. 1983) (private organization with "vibrant interest in," but not "adversely affected" by, challenged agency action lacks standing). If, however, an organization points to a "concrete and demonstrable injury to [its] activities," not "simply a setback to the organization's abstract social interests," the organization will have passed through the first gateway. *Havens*, 455 U.S. at 379.

That the alleged harm affects the organization's non-economic interests — for example, its interest in encouraging open housing — "does not deprive the organization of standing." *Id.* at 379 n.20 (internal citation omitted). An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation. *See Haitian Refugee Center v. Gracey*, 809 F.2d 794, 799 n.2 (D.C. Cir. 1987) (opinion of Bork, J.). *Havens* makes clear, however, that an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action. *See Havens*, 455 U.S. at 379.

Plaintiff organizations have alleged such injuries here. We first summarize, and then elaborate on, the organizations' allegations. Both MWPHA and FHC have charged that defendants' preferential advertising tended to steer black home buyers and renters away from the advertised complexes and thus impelled the organizations to devote

resources to checking or neutralizing the ads' adverse impact. The organizations also claimed that the advertisements required them to devote more time, effort, and money to endeavors designed to educate not only black home buyers and renters, but the D.C. area real estate industry and the public that racial preference in housing is indeed illegal.

Relating the organizations' claim to standing in more detail, we begin with the statute. Section 804(c) of the Fair Housing Act prohibits any advertisement that "indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. § 3604(c). Section 812(a) of the Act expressly provides a private right of action to enforce the rights created by Section 804. *See id.* § 3612(a).

Plaintiffs complained that the "repeated and continued depiction of white models and the complete absence of black models" in defendants' advertisements "indicate a preference based on race" in violation of the statute. Colonial Complaint ¶ 12, Joint Appendix (J.A.) at 12; Gerstin Complaint ¶ 7, J.A. at 22. Plaintiffs crucially alleged that these advertising practices "interfered with plaintiff FHC and MWPHA's efforts and programs intended to bring about equality of opportunity for minorities and others in housing" and required plaintiffs "to devote scarce resources to identify and counteract defendants' advertising practices." Colonial Complaint ¶ 17, J.A. at 13; Gerstin Complaint ¶ 27, J.A. at 22.

In affidavits submitted to the district court, the executive directors of MWPHA and FHC further related how defendants' advertisements concretely injured the organizations by depleting scarce resources, apart from generating expenditures in these enforcement actions.[1] The

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[1]This court and the district court may properly consider affidavits submitted by the parties, in addition to the complaint, to resolve the standing question. The courts may also permit plain-

directors first charged that defendants' white-only advertising "reinforces archaic stereotypes of segregation in housing" and "encourages discriminatory attitudes." Declaration of Larry Weston, Executive Director MWPHA ¶ 9, J.A. at 118; Declaration of Patricia A. Horton, Executive Director FHC ¶ 11, J.A. at 126. MWPHA's director then alleged that "[t]his directly decreases the effectiveness of the MWPHA's efforts to educate the real estate industry and the community" about laws prohibiting discrimination in housing and "necessitates increased educational efforts to counteract the influence of defendants' discriminatory ads." Declaration of Larry Weston ¶ 9, J.A. at 118. FHC's director made similar allegations about the ads' effects on FHC's education programs.

Both organizations claimed that the advertising "impacts adversely" on the organizations' "real estate testing program by acting as a 'steering' method which discourages black home buyers and renters before they ever reach a particular complex, necessitating the [organizations] to broaden the scope of [their] efforts in order to reach all forms of discriminatory housing practices." Declaration of Patricia A. Horton ¶ 11, J.A. at 126-27; Declaration of Larry Weston ¶ 9, J.A. at 118. MWPHA and FHC reiterated, in line with *Havens Realty*, that they have been "frustrated by defendants' . . . practices," which have discouraged black home buyers and renters from considering defendants' housing and required the organizations to expend additional resources to identify and dispel this discouragement. *See Havens*, 455 U.S. at 379.

The "drain[s] on the organization[s'] resources" alleged here appear no less palpable or specific than the injuries

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tiffs to amend their complaints to make the necessary allegations. *See* Warth v. Seldin, 422 U.S. 490, 501 (1975); *see also* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 95, 113 n.25 (1979) (finding standing for some plaintiffs based on allegations in complaints "as illuminated by subsequent discovery" and permitting other plaintiffs "to amend their complaints to include allegations of actual harm").

asserted by the organizational plaintiff in *Havens*. *See Havens*, 455 U.S. at 363 (finding sufficient the following statement: "Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices."); *see also Saunders v. General Services Corp.*, 659 F.Supp. 1042, 1052 (E.D. Va. 1987) (finding sufficient organizational plaintiffs' complaint allegations, which were substantially identical to those in this case); *Pacific Legal Foundation v. Goyan*, 664 F.2d 1221 (4th Cir. 1981) (organization alleged sufficient injury due to increased time and expense necessary for it to monitor FDA activities under new agency regulation). In sum, increased education and counseling could plausibly be required, as we earlier indicated, to identify and inform minorities, steered away from defendants' complexes by the challenged ads, that defendants' housing is by law open to all. Educational programs might complementarily be necessary to rebut any public impression the advertisements might generate that racial discrimination in housing is permissible.

MWPHA and FHC thus do not simply claim that they are psychically injured by witnessing noncompliance with the Fair Housing Act. *Cf. Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1328 n.41 (D.C. Cir. 1986) (damage to interest in fuel conservation not injury); *McKinney v. U.S. Dep't of Treasury*, 799 F.2d 1544, 1552 (Fed. Cir. 1986) (injury founded on adverse psychological consequences arising from inadvertent support of immoral conduct with which appellants disagree too abstract to satisfy Article III). The organizations instead allege concrete drains on their time and resources. Expenditures to reach out to potential home buyers or renters who are steered away from housing opportunities by discriminatory advertising, or to monitor and to counteract on an ongoing basis public impressions created by defendants' use of print media, are sufficiently tangible to satisfy Article III's

injury-in-fact requirement. *See Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986) (senior citizen assistance organization had standing where injury was based on programmatic concerns, not on purely ideological interests in the agency's actions).

This adequately asserted depletion of resources is also, as the courts in *Havens* and *Saunders* found, fairly traceable to the alleged racially-preferential advertising and likely to be redressed by court-ordered declaratory relief. The Supreme Court has noted that "in many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." *See Allen v. Wright*, 468 U.S. 737, 751-52 (1984). Having made the suggested comparison in this case, we conclude that both plaintiff organizations have standing.[2]

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[2]Because we conclude that the organizations have standing on their own behalf, we do not decide whether individual plaintiff Spann or the organizations as representatives of their members possess standing. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264 n.9 (1977). Indeed, we could not resolve these questions without remanding to the district court to allow plaintiffs to amend their complaints or to supplement the record. *Cf. Havens*, 455 U.S. at 377-78 (remanding to "afford [two of the individual] plaintiffs an opportunity to make more definite the allegations of the complaint"). MWPHA and FHC have not clearly charged how the challenged advertisements "deprive[ ] [their members or constituents] of the benefits of living in a racially integrated community." Declaration of Larry Weston ¶ 10, J.A. at 118-19; Declaration of Patricia A. Horton ¶ 12, J.A. at 127. Plaintiff Spann has alleged only that he "incurred indignation" and "distress" as a result of the alleged violation. Colonial Complaint ¶ 16, J.A. at 13; Gerstin Complaint ¶ 26, J.A. at 22. Although "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth*, 422 U.S. at 500, we question whether Congress intended 804(c) to confer a legal right on all individuals to be free from indignation and distress. *But see Saunders*, 659 F. Supp. at 1053 (mere receipt of preferential advertising violates statute and thus confers standing). We have no doubt, however, that an individual plaintiff who alleged and later proved that an advertisement indicating a racial preference deterred her from seeking housing in the advertised property would possess standing. *See id.*

Like the organization in *Havens*, MWPHA and FHC must ultimately prove at trial that the defendants' illegal actions actually caused them to suffer the alleged injuries before they will be entitled to judicial relief. *See Havens*, 455 U.S. at 363 n.21. This effort will require, of course, proof that defendants violated the Act, *i.e.*, that to a "reasonable reader the natural interpretation of defendants' advertisements . . . is that they indicate a racial preference" or an intention to make such a preference. *See Saunders*, 659 F.Supp. at 1058 (quoting *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972)); *accord Ragin v. Steiner, Clateman and Assocs.*, 714 F.Supp. 709, 713 (S.D.N.Y. 1989) (question of fact for jury whether all white advertisements violate 42 U.S.C. § 3604(c)). MWPHA and FHC will also have to prove that this violation actually caused them to expend resources or to suffer some other concrete injury. For example, as previously noted, MWPHA and FHC might prove that the advertisements discouraged potential minority home buyers from attempting to buy homes at defendants' developments and forced the organizations to spend funds informing minority home buyers that the homes are in fact available to them. Or the organizations could show that the ads created a public impression that segregation in housing is legal, thus facilitating discrimination by defendants or other property owners and requiring a consequent increase in the organizations' educational programs on the illegality of housing discrimination.

To conclude this discussion of standing, we return to our starting line (*see supra* p. 5) to underscore the difference between this suit and one presenting only abstract concerns or complaints about government policy or conduct. *Cf. Reservists to Stop the War*, 418 U.S. at 217; *Sierra Club*, 405 U.S. at 738-40; *Frothingham v. Mellon*, 262 U.S. 447 (1923). The ideological or undifferentiated injury cases, unlike this case, characteristically are suits against the government to compel the state to take, or desist from taking, certain action. Such cases implicate

most acutely the separation of powers, which, the Supreme Court instructs, is the "single basic idea" on which the Article III standing requirement is built. *See Allen v. Wright*, 468 U.S. at 752; *Valley Forge Christian College*, 454 U.S. at 472. The standing barrier, as it operates in undifferentiated injury cases, prevents the courts from interfering in questions that "[o]ur system of government leaves ... to the political processes." *Reservists to Stop the War*, 418 U.S. at 227.

Plaintiffs here do not seek to compel government action, to involve the courts in a matter that could be resolved in the political branches, or simply "to vindicate their own value preferences through the judicial process." *Sierra Club*, 405 U.S. at 740. Plaintiffs are private actors suing other private actors, traditional grist for the judicial mill. Their suit does not raise the concerns that may arise when a public agency or officer is sued to achieve change in a government policy. *Cf. Northwest Airlines v. FAA*, 795 F.2d 195, 203 n.2 (D.C. Cir. 1986). To the extent that plaintiffs seek to vindicate values, those values were endorsed by Congress in the Fair Housing Act, the enforcement of which Congress specifically left in the hands of private attorneys general like plaintiffs.[3] Although the Attorney General and the Department of Housing and Urban Development may enforce the Act, their resources are markedly limited. *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972). Congress decided, therefore, to rely primarily on "private suits in which, the Solicitor General [has noted,] the complainants act not only on their own behalf but also 'as private

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[3]We do not suggest that separation of powers concerns totally regress so long as (1) Congress, rather than the courts, declares who may sue, and (2) all parties are private rather than public actors. Even in the absence of encroachment by one branch on the domain of another, there may remain as a live issue the appropriate functions of each branch. While congressional intention to authorize an action between private parties thus may not suffice to meet Article III strictures, the will of the legislature "cannot be overlooked in determining whether [plaintiffs] have standing to sue." *Havens*, 455 U.S. at 373.

attorneys general in vindicating a policy that Congress considered to be of the highest priority.' " *Id.* (quoting Solicitor General's comments at oral argument).

Enforcement by private attorneys general has become a feature of many modern legislative programs. Congress has recognized the usefulness and the courts have acknowledged the propriety of reliance on an individual or group actually injured, or threatened with injury, to vindicate the public interest. *See, e.g., Allen v. State Board of Elections,* 393 U.S. 544, 556-57 (1969); *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 401-02 (1968); *J.I. Case Co. v. Borak,* 377 U.S. 426, 432 (1964). Indeed, such individuals and groups may assert the public interest even when their own interests do not precisely coincide. *See, e.g., Sanders v. FCC,* 309 U.S. 470, 476-77 (1940). Plaintiffs' interests here overlap with the public interest in open housing and nondiscriminatory advertising embodied in the Fair Housing Act. The policies of the Act and the concrete injuries alleged by the plaintiff organizations thus intertwine to support plaintiffs' standing to bring this suit.

Timeliness of Appeal

We turn next to the timeliness of this appeal. The Gerstin appellees say the appeal in the case against them is too late; MLDC, on the other hand, objects that appellants have come here too soon. We conclude that the case is properly before us as to all appellees.

Far from appealing "seventeen months too late," *see* Brief for Appellees Marvin Gerstin Associates, Inc. and Marvin Gerstin at 3, plaintiffs were unable to engage this court's review at an earlier time. The district court's May 1987 decision left issues open as to one of the defendants, *i.e.,* MLDC's service of process/personal jurisdiction objections had not been addressed; the decision was thus unfinished, and therefore remained unripe for appellate review. *See* FED. R. CIV. P. 54(b); *Cablevision Systems Development Co. v. Motion Picture Ass'n,* 808 F.2d 133, 136 (D.C. Cir. 1987) (order deciding fewer than all of sev-

eral consolidated cases does not become final judgment for purposes of appellate review absent an "express determination" to that effect by the district judge pursuant to Rule 54(b)).

Plaintiffs did attempt an appeal in June 1987, but Colonial Village blocked that move by successfully asserting, as grounds for dismissal, the final judgment rule. *See Spann v. Colonial Village, Inc.*, Nos. 87-7118 & 87-7119 (D.C. Cir. Apr. 6, 1988) (order dismissing consolidated appeals "without prejudice for lack of a final order under Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291"). At that time, the Gerstin defendants stood silently by. They never urged severance of the claims against them. First, they sought no Rule 54(b) certification from the district court when that court issued the May 1987 unfinished decision. Later, they proposed no deconsolidation in this court to salvage the plaintiffs' June 1987 try for an earlier appeal. They have no tenable basis, therefore, for urging their exemption from the current appeal. In short, this appeal, taken within thirty days of the October 1988 disposition, *see* FED. R. APP. P. 4(a), is not too late.

Nor is the appeal premature, as MLDC contends it is. The district court expressly stated that its October 1988 Memorandum and Order resolving remaining issues "makes judgment in these cases final." *Spann*, 124 F.R.D. at 2. However, that court did not publish its final judgment in a separate document in the manner FED. R. CIV. P. 58 instructs: "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." *See also* Appendix of Forms, FEDERAL RULES OF CIVIL PROCEDURE, Form 32 and accompanying Notes of Advisory Committee on Rules (indicating obligation of district court judge and clerk to see to the prompt preparation and entry of judgment in conformity with Rule 58).

The purpose of the "separate document" requirement is explained in the Notes of Advisory Committee on Rules concerning the 1963 Amendment to Rule 58:

> Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted[.]" ... Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running ... for the purpose of appeal....
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> The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document — distinct from any opinion or memorandum — which provides the basis for the entry of judgment. That judgments shall be on separate documents is also indicated in Rule 79(b); ....

The separate-document requirement, although a salutary main rule, is not a "categorical imperative." *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 (1978) (per curiam). Rule 58, as amended in 1963, clarifies that "a party need not file a notice of appeal until a separate judgment has been filed and entered." *Id.* at 385 (citing *United States v. Indrelunas*, 411 U.S. 216, 220-22 (1973)). The Rule thus shelters the right to appeal. But

> [i]f, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose.

Id. (footnote omitted).

Rule 58, we agree, "must be applied in such a way as to favor the right to appeal." *Matter of Seiscom Delta, Inc.*, 857 F.2d 279, 283 (5th Cir. 1988). Thus,

> "[i]f an appellant files his notice of appeal from a final judgment within the prescribed time after the entry of the judgment as a separate document, his appeal cannot be defeated by the argument that his time to appeal began to run from the entry of some earlier decision, opinion, or order."

Id. at 284 (quoting *Hanson v. Town of Flower Mound*, 679 F.2d 497, 502 (5th Cir. 1982)).[4] Harmoniously, where the separate-document requirement has been overlooked by the district court, so long as "it is clear that the district court has intended a final, appealable judgment, mechanical application of the separate-judgment rule should not be used to require the pointless formality of returning to the district court for ministerial entry of judgment; instead, the right to immediate appeal is favored." *Id.* at 283.

In sum, the district court, in October 1988, took what was plainly meant to be its ultimately dispositive adjudicatory action, constituting its final decision in the case. That decision, we hold, qualifies as "final" for purposes of appellate review pursuant to 28 U.S.C. § 1291 (authorizing review of "final decisions" of district courts). While we are thus satisfied that the appeal is not premature, we emphasize that, to avoid dispute and promote certainty, it is the better practice for the district court to assure as a matter of course the entry of each judgment as a separate document. *See id.* at 284.

Personal Jurisdiction over MLDC

In an April 11, 1989 order, a motions panel of this court ruled that, because MLDC had not filed a cross-appeal, the court could not entertain MLDC's arguments regarding the absence of personal jurisdiction. That ruling, how-

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[4]We recognize that a document labeled "Order" rather than "Judgment" may satisfy Rule 58 sufficiently to start the appeal clock running, if the order is succinctly to the point, and does not have the characteristics of an elaborative opinion. *See* United States v. Perez, 736 F.2d 236, 237-38 (5th Cir. 1984) (cautioning against "mindless" application of Rule 58).

ever, was made without benefit of a full display of the procedural situation in this case; we therefore deem the ruling "without prejudice to reexamination upon full briefing and argument" before the merits panel. *See Association of Investment Brokers v. SEC*, 676 F.2d 857, 863 (D.C. Cir. 1982).

It is true that forum objections, *i.e.*, personal jurisdiction and venue, can be waived at any stage of a proceeding and ordinarily are waived by failure to take a cross-appeal. *See United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 & n.11 (1924). However, "a cross-appeal is not a jurisdictional requirement," and omission of that proper procedural step can be excused when the circumstances so warrant. *See Freeman v. B&B Assocs.*, 790 F.2d 145, 151 (D.C. Cir. 1986).

We conclude that the requisite exceptional circumstances are present here; accordingly, we will take up MLDC's personal jurisdiction challenge. Just as we declined to apply Rule 58 mechanically to insist on a separate-judgment document as a prerequisite to plaintiffs' appeal, so we decline to preclude MLDC from raising objections it plainly intended to preserve. The uncertainty generated by the absence of a judgment conforming to Rule 58's separate-document requirement both explains and excuses MLDC's failure to cross-appeal. Neither plaintiffs nor MLDC should be trapped by the confusion that existed over the timeliness of plaintiffs' appeal.

MLDC complains that process was not properly served on it. More fundamentally, MLDC denies the existence of the minimum contacts with this forum and lawsuit necessary to justify, under due process, maintenance of the action against it. *But cf. Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir. 1977) (fifth amendment due process, as distinguished from fourteenth amendment, requires sufficient affiliating contacts with the United States, rather than with a particular state). *See also* Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to the Fed-

eral Rules of Civil Procedure 29-31 (1989) (proposing nationwide service of process in all civil actions arising under federal law).

When this litigation returned to the district court following this court's April 1988 dismissal of the June 1987 appeal for want of a final order, plaintiffs promptly moved for the entry of final judgment. The district court thereupon considered the two matters still open in the consolidated cases: the Gerstin defendants' motion for Rule 11 sanctions against plaintiffs; and MLDC's motion to dismiss on grounds of improper service and lack of the requisite presence in or contacts with the forum. The district court denied the Gerstin defendants' motion for sanctions as baseless, and also denied MLDC's motion. The district court concluded that plaintiffs' several attempts to serve MLDC out-of-state by mail and personal delivery were unavailing; that court held, however, that the proper service made on MLDC's co-defendant and wholly-owned subsidiary, Colonial Village, sufficed to draw in MLDC as well. The district court stated:

> [MLDC] conducts business in this jurisdiction, in many ways, including through Colonial Village, whose employees expressly hold themselves out as agents of [MLDC]. They list the parent corporation on their business cards and advertise [MLDC's] control of the property.

Spann, 124 F.R.D. at 2.

Plaintiffs-appellants, in the instant appeal, did not address MLDC's contentions that it was never served properly and that, in any event, it lacks the requisite affiliation with the District. Instead, plaintiffs-appellants argued only that MLDC's personal jurisdiction objections are precluded, an argument we have rejected. *See supra* pp. 15-16. Examining the record ourselves, however, we find (and MLDC concedes) that an officer of Colonial did indeed display a business card identifying Colonial Village, Inc. as "a Mobil company." But that is all we find. If there is more to connect MLDC to this case and forum,

e.g., advertisements for Colonial Village mentioning Colonial's affiliation with MLDC, it has not been pointed out to us.

Because we are unable to review intelligently the personal jurisdiction questions (MLDC's affiliation with the District, and the propriety of serving Colonial on MLDC's behalf) on the basis of the thin materials at hand, we return the matter of the amenability of MLDC to suit here for further airing. Noting that the liaison between MLDC and Colonial Village bears not only on the nexus required for personal jurisdiction and the sufficiency of service of process, but on the merits of the complaint against MLDC as well, we leave it to the district court to decide whether discovery concerning the character of Colonial's advertising and affiliations with MLDC should precede a definitive ruling on personal jurisdiction over MLDC.[5]

Fair Housing Act Claims

The district court dismissed plaintiffs' FHA claims as time-barred; we reverse that ruling because it erred in its method of determining whether a violative act occurred within the prescribed period.

Currently, the Fair Housing Act has a standard, two-year statute of limitations:

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing

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[5]When plaintiffs moved in May 1988 for an order entering final judgment, they asked the district court 1) to deny MLDC's motion to quash service as moot, if that was the court's original intention, or 2) to deny the motion on its merits, or 3) "if the court determines that [MLDC's] motion to quash service ... may not be denied on the present state of the record, then ...[to] permit[ ] discovery as to the issues raised by the motion but grant[ ] a certificate under Rule 54(b) permitting the appeal to proceed ... as to all other parties."

> practice ... to obtain appropriate relief with respect to such discriminatory housing practice ....

42 U.S.C. § 3613(a)(1)(A) (1989). At the time these actions commenced, however, Congress prescribed: "A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory practice occurred." 42 U.S.C. § 3612(a) (1982). Where one discrete act of discrimination was at issue, the prescription was unproblematic: that act had to fall within 180 days of the filing of the court complaint. "Continuing violations," on the other hand, were less readily fitted to the statute's terms. Eventually, the Supreme Court confirmed lower court opinion that

> where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitation period, the complaint is timely when it is filed within 180 days of *the last asserted occurrence* of that practice.

Havens, 455 U.S. at 380-81 (emphasis added); *see also McKenzie v. Sawyer*, 684 F.2d 62, 72 & n.8 (D.C. Cir. 1982) (explaining, in the context of Title VII of the Civil Rights Act of 1964, the timeliness of charges of discrimination antedating but persisting into the limitations period, and distinguishing from the time in which to file charges, the time period for which recovery is available).[6]

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[6]We recognize that the alleged violations in *Havens* were different from those pressed here. In *Havens*, any one of the acts allegedly committed by the defendant (lying to a tester about the availability of housing) would constitute a violation of § 804(a) of the FHA. Here, by contrast, it is highly unlikely that a single ad containing only white models could alone violate § 804(c). However, in *McKenzie*, *supra*, we upheld a grant of summary judgment in favor of plaintiffs on their Title VII claim even though no single act of the defendant would likely have violated Title VII. We recognized there that plaintiffs' Title VII claim "rested largely on sheer numbers," 684 F.2d at 68, and looked to defendant's conduct before the actionable period to show the violative character of defendant's conduct in that period. In failing to make an inquiry of the latter kind, the district court erred.

The district court identified as the relevant time frames in this litigation April 1986 to October 1986 for the complaint against Colonial, and May 1986 to November 1986 for the complaint against the Gerstin defendants. That court arrived at each of these two periods by counting back 180 days from the complaint filing. *See Spann*, 662 F.2d at 546. If these frames were the correct ones, the summary judgment for the defendants would have been secure, for in those months, apparently spurred by plaintiffs' administrative complaints,[7] over twenty-eight percent of Colonial's ads published in *The Washington Post* and over forty percent of the Gerstin ads published in *The Post* featured black models. *See id.* at 543.[8]

But plaintiffs' complaints are not centered on those periods. Instead, plaintiffs complain of periods in which both Colonial and the Gerstin defendants featured *exclusively* white models. In the case against Colonial, that period runs from January 1985 to April 1986, and in the case against the Gerstin defendants, the relevant time frame is January 1985 to May 1986. In each case, the last of the long stream of all white ads, plaintiffs allege, occurred within the 180-day zone, *i.e.*, in April or May 1986; thus, under the "continuing violation"/"last asserted occurrence" theory that the Supreme Court has advanced, *see supra* p. 19, the plaintiffs claims are not time-barred.[9]

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[7]Several months before instituting court actions, plaintiffs filed administrative complaints with the District of Columbia Office of Human Rights and the United States Department of Housing and Urban Development.

[8]In another case brought by the same plaintiffs, the district court said it had held in this case only "that if in real estate advertisements some photographs feature white models, some black models, and some of both, no violation of the [Fair Housing] Act occurs merely because the races are not represented proportionately to population, or because black models are not included in every display, unless an intention to discriminate is shown by extrinsic evidence." Spann v. The Carley Capital Group, Nos. 87-1154 & 87-1155, slip op. at 7 (D.D.C. Dec. 12, 1988).

[9]The district court appeared to recognize in its second encounter with this case that its initial time-bar decision bore reexamina-

Section 1981 and 1982 Claims

The provisions of 42 U.S.C. §§ 1981, 1982, the Supreme Court has restated, have a limited province and do not qualify as all-purpose antidiscrimination or comprehensive open housing laws; in particular, the High Court has said that section 1982 "does not prohibit [real estate] advertising or other [dwelling place sale or rental] representations that indicate discriminatory preferences." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968); *see also Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2372 (1989) (construing § 1981 in light of § 1982). The district court properly dismissed the claims plaintiffs attempted to state under the headings of these post-Civil War civil rights measures, *see Spann*, 662 F.Supp. at 547, and we have no cause to add to that court's statement.

Conclusion

For the reasons stated, we reverse the district court's ruling that plaintiffs' Fair Housing Act claims are time-barred and we return the case for further proceedings consistent with this opinion.

It is so ordered.

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tion. Dismissing the Gerstin defendants' motion for sanctions, the district court said:

> [D]efendants contend that their advertising during the 180 days prior to the filing of the complaint does not indicate a racial preference, and that the complaint is therefore without basis in fact. In fact, however, the complaint of racial preference in defendants' ads is not limited to that time period. Only the last asserted occurrence of a practice of racial preference need be in that 180 day period. In its Opinion of May 22, 1987, the Court found that the last of defendants' all-white ads was published within the 180-day limitations period beginning on May 24, 1986.

Spann, 124 F.R.D. at 3.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7118

September Term, 1987

CA 86-02917

CA 86-03196

Girardeau A. Spann, et al.,

Appellants

v.

Colonial Village, Inc., et al.

And Consolidated Case

United States Court of Appeals
For the District of Columbia Circuit

FILED APR 6 1988

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Robinson, Silberman and Williams, Circuit Judges

ORDER

Upon consideration of appellants' Motion for Leave to Seek Correction of the District Court's Order under Fed. R. Civ. P. 60(a) and appellees' Cross-Motion for Dismissal of Appeal under Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291 (1982), it is

ORDERED by the court that appellants' Motion for Leave be denied. It is

FURTHER ORDERED that appellees' Motion for Dimissal of Appeal be granted. The appeals are hereby dismissed without prejudice for lack of a final order under Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291 (1982).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7257

September Term, 1988

C.A. No. 86-2917

Girardeau A. Spann, et al.,

Appellants

v.

Colonial Village, Inc., et al.

And consolidated case

United States Court of Appeals
For the District of Columbia Circuit

FILED APR 11 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Wald, Chief Judge; Robinson and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion of Mobil Land Development Corporation for dismissal of appeal, the motion to dismiss of appellees Gerstin, the opposition thereto and the replies, it is

ORDERED that the motions to dismiss be denied. Because Mobil has not filed a cross-appeal, this court cannot consider Mobil's arguments regarding personal jurisdiction.

See Freeman v. B & B Associates, 790 F.2d 145, 150-51 (D.C. Cir. 1986) (appellee cannot attempt to overturn or modify a district court's judgment, with a view to enlarging his own rights thereunder or lessening the rights of his adversary, unless he takes a cross-appeal) (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924)). As to the finality claim, this court previously determined, in an order filed April 6, 1988, that the district court's May 22 decision was not final and therefore could not be appealed. *See* Fed. R. Civ. P. 54(b). Rather, as we now confirm, the district court's October 13 decision constitutes the final decision in this matter. Therefore, the second appeals, taken from the district court's October 13 decision, are timely and cannot be dismissed on that ground. Moreover, the district court's May 22 decision extends to Mobil as well as to Colonial Village and Gerstin, and there is no ongoing proceeding in the district court in regard to Mobil.

Per Curiam

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7257
September Term, 1988
CA 86-2917

Girardeau A. Spann, et al.,
Appellants

v.

Colonial Village, Inc., et al.

United States Court of Appeals
For the District of Columbia Circuit

FILED MAY 19 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Wald, Chief Judge; Robinson and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of the Gerstin appellees and of Mobil Land Development Corporation it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7257

September Term, 1989

CA 86-2917
86-3196

Girardeau A. Spann, et al.,

Appellants

v.

Colonial Village, Inc., et al.

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and Consolidated Case No. 88-7260

United States Court of Appeals
For the District of Columbia Circuit

FILED MAY 03 1990

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Wald, Chief Judge; Ruth B. Ginsburg and Williams, Circuit Judges

ORDER

Upon consideration of the Petitions for Rehearing of Marvin Gerstin and Marvin Gerstin Associates, Inc., Mobil Land Development Corporation and Colonial Village, Inc., it is

ORDERED, by the Court, that the aforesaid Petitions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2917

GIRARDEAU A. SPANN, et al.,

Plaintiffs,

v.

COLONIAL VILLAGE, INC.,

Defendant.

Civil Action No. 86-3196

GIRARDEAU A. SPANN, et al.,

Plaintiffs,

v.

MARVIN J. GERSTIN, et al.,

Defendants.

Civil Action No. 86-3268

GIRARDEAU A. SPANN, et al.,

Plaintiffs,

v.

HOWARD BOMSTEIN, et al.,

Defendants.

FILED

MAY 22 1987

CLERK, U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA

OPINION

In these consolidated cases,[1] plaintiffs Girardeau A. Spann, the Fair Housing Council of Greater Washington ("FHC), and the Metropolitan Washington Planning and Housing Association ("MWPHA") have brought suit, seeking a declaratory judgment, permanent injunctive relief and damages, against Colonial Village, Inc. ("Colonial"), Marvin Gerstin Associates, Inc., an advertising agency and Marvin Gerstin (collectively referred to as "Gerstin"), alleging that the advertisement campaigns of these defendants in *The Washington Post* featuring exclusively white models indicate a racial preference in violation of the Fair Housing Act, 42 U.S.C. § 3604(a) and (c) and sections 1981 and 1982 of the 1966 Civil Rights Act, 42 U.S.C. §§ 1981, 1982.

Colonial and Gerstin have moved to dismiss or, in the alternative for summary judgment, on the grounds, *inter alia*,[2] that plaintiffs have failed to state a claim under

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[1] Originally, three cases were involved in this consolidated action. By a stipulation of dismissal filed on March 30, 1987, plaintiffs' suit against Howard Bomstein and related defendants, *Spann* v. *Bomstein*, C.A. No. 86-3268, was dismissed with prejudice.

[2] Both defendants assert additional grounds in their respective motions. Colonial contends that the plaintiff associations, the FHC and the MWPHA, do not have valid claims for monetary damages. On the basis of a somewhat similar argument, Gerstin's motion argues that plaintiffs' claims are barred by the First Amendment to the Constitution. According to the longstanding principle that courts should decline to resolve constitutional issues if such resolution can be avoided by adjudication of a statutory issue or issues, *see Schmidt* v. *Oakland Unified School Dist.*, 457 U.S. 594 (1982); *Siler* v. *Louisville & Nashville*

either section 1981 or 1982, and that plaintiffs' claim under the Fair Housing Act ("FHA") is barred by the limitations period set forth in that statute. *See* 42 U.S.C. § 3612(a). Gerstin's motion to dismiss is based on the additional ground that plaintiffs have failed to state a claim upon which relief may be granted under the FHA.[3]

To facilitate an orderly and logical disposition of the issues raised in the motions of the two defendants, and in light of the substantial similarity of the issues raised in the motions, this Opinion will address those issues in the following manner. After briefly discussing the factual background, the Court will consider the various motions

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Railroad Co., 213 U.S. 175, 193 (1909), the Court finds it unnecessary to address Gerstin's First Amendment argument as this case can be disposed of on statutory grounds. The standing arguments mentioned above, as well as a Colonial motion to strike, seal, or expunge the complaint likewise do not need to be discussed since the other grounds in the motions completely dispose of plaintiffs' claims.

[3] Plaintiffs also allege that, by using ads exclusively featuring white models over a significant period of time, Gerstin has breached a Conciliation Agreement, which was signed by Gerstin and the MWPHA among others. Gerstin also moves to dismiss plaintiffs' claim on the ground that it is barred by the statute of limitations. *See* D.C. Code § 12-301(7). Since the Court concludes that defendants' motions to dismiss are meritorious, *see infra*, and therefore will grant these motions, the contractual claim is properly before this Court only if the Court exercises its discretion to retain pendent jurisdiction over that claim. *See United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 726 (1966).

The Supreme Court has stated that if federal claims supporting the basis for jurisdiction are dismissed before trial, even though those claims are not insubstantial in a jurisdictional sense, the state claims should be dismissed. *Id.* Some lower federal courts, however, have departed from this dictum and hold that dismissal of the state law claim in such situations is discretionary, based upon considerations of judicial economy, convenience and fairness. *See, e.g., Financial General Bankshares, Inc.* v. *Metzger*, 680 F.2d 768, 773-74 (D.C. Cir. 1982). In this case, consideration of those factors indicates that dismissal of the contractual claim would be proper since extensive pretrial proceedings have not yet occurred. Consequently, the Court will decline to retain jurisdiction over the contractual claim and will dismiss it without prejudice.

regarding the claim under the FHA, including the statute of limitations arguments. This will be followed by a brief discussion of defendants' motions to dismiss the section 1981 and 1982 claims.

I

From January 1985 to April 24, 1986, Colonial caused to be published advertisements in *The Washington Post* for the sale of housing units in the Colonial Village complex in Arlington, Virginia. These advertisements featured exclusively white models. Contending that these all-white model advertisements conveyed a racial preference for white purchasers, plaintiffs filed administrative complaints with the District of Columbia Office of Human Rights ("OHR") and the United States Department of Housing and Urban Development ("HUD") on April 24, 1986. To date, one year later, these complaints remain unresolved. However, apparently as a consequence of the pendency of the administrative complaints, Colonial adopted a written policy that, according to it, reflects its commitment to equal housing opportunity, in that it specifically requires nondiscriminatory selection of models for Colonial's ads. Colonial claims that it notified its advertising agency of this policy and instructed it to ensure that an adequate number of black models were featured in Colonial's ads.

During the ten-month period from April 24, 1986 to February 24, 1987, at least thirty-six percent of Colonial's ads published in *The Post* have featured black models. During the 180 days immediately preceding the filing of the complaint herein, 28.6 percent of all of Colonial's ads in *The Post* featured a black model. None of Colonial's ads, at any time, has contained language indicating or suggesting a racial preference. To the contrary; all of its ads in *The Post* have included the phrase "Equal Housing Opportunity" as well as a related logo.

As far as Gerstin is concerned, it placed advertisements depicting only white models from January 1, 1985 to May

30, 1986 for *inter alia*, the Crystal, Espirit, Horizons, and Tivoli Woods properties in Arlington, Virginia. Plaintiffs filed administrative complaints with the OHR and HUD challenging these advertising practices as well. As with the administrative complaints filed against Colonial, the complaints against Gerstin remain unresolved. During the 180-day period immediately preceding the filing of the complaint in this action, thirty percent of the published, display ads made by Gerstin featured black models, and forty percent of the Gerstin display ads published in *The Post* during that period featured one or more black models.

II

Plaintiffs assert that the advertising practices involved here violate section 3604(c) of the Fair Housing Act, 42 U.S.C. § 3604(c).[4] Section 3604(c) prohibits the "mak[ing], print[ing], or publish[ing] or caus[ing] to be made, printed, or published" any advertisement for the purchase or lease of a dwelling that indicates any discriminatory preference or an intention to make any such preference. Plaintiffs contend that defendants have violated section 3604(c) by making or causing to be made real estate ads featuring only white models over a period of approximately eighteen months. Supporting this claim, plaintiffs cite several court decisions as well as certain regulations promulgated by HUD construing section 3604(c). These contentions are not well taken.

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[4] The complaint also alleges that Colonial and Gerstin violated section 3604(a) of the FHA, 42 U.S.C. § 3604(a). However, plaintiffs have not alleged that defendants have refused to sell or rent housing, refused to negotiate for such sale or rental, or have otherwise denied any housing on the basis of race. Gerstin's motion to dismiss for failure to state a claim under section 3604(a), will therefore be granted. Further, since plaintiffs cannot prevail substantively under section 3604(a), Colonial could not have violated that section within the 180-day period immediately preceding the filing of the complaint, and Colonial's motion to dismiss this claim pursuant to section 3612(a) will also be granted.

First. Each of the cases in which a court found a violation of section 3604(c) involved far different and far more direct and affirmative indications of racial preference than are present here. For example, in *United States* v. *Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), the Fourth Circuit not surprisingly held that a rental ad specifying that the apartment was in a "white home" violated section 3604(c). Similarly, an oral statement to a white tenant by her landlord requesting that the tenant send her friends over to see an apartment available for rent in the building, but to "make sure her friends are whites," was held to violate the FHA. *United States* v. *Gilman*, 341 F. Supp. 891 (S.D.N.Y. 1972). And in *Saunders* v. *General Services Corporation*, C.A. No. 86-0229-R (E.D. Va. May 12, 1987), Judge Merhige recently found a violation of section 3604(c) where, in addition to the failure to use black models, there was substantial evidence that personnel of the corporation managing the apartment complexes in question repeatedly were instructed to treat black tenants and prospective tenants less favorably than whites; that the corporation committed a fraud when it agreed to use but did not, in fact, use an equal housing opportunity slogan or logo; and that it virtually failed to use black models in a brochure with sixty-eight photographs of which 134,000 copies were printed. *See also Holmgren* v. *Little Village Community Reporter*, 342 F. Supp. 512 (D.C. Ill. 1971) (ad indicating a preference for purchaser or tenant who spoke a particular language held to violate section 3604(c)).

All of these precedents are a far cry from advertisements in a daily newspaper during the period covered by the law (*see* Part IV *infra*) (1) some of which depicted only white models, some only black models, and some a mixture of both; (2) in which the number of black models used hovered between approximately thirty and forty percent; and (3) all of which included an equal housing opportunity slogan and logo.

These precedents would help plaintiffs only if they could somehow be construed to require proportional representation of the models of each race in all advertising, but no case has so held.[5]

Second. HUD's regulations pursuant to section 3604(c) of the FHA, do provide that "[i]f models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area and both sexes." 24 C.F.R. § 109.30(b). However, not only is that provision substantively vague, but it, and other related regulations, state only that certain practices may "indicate" a violation of the FHA or may be "evidence of compliance" with the FHA. 24 C.F.R. §§ 109.25, 109.30.

More fundamentally, these regulations were promulgated pursuant to the authority given to HUD to investigate complaints alleging discriminatory housing practices and to refer cases to the Attorney General to initiate suit, 42 U.S.C. §§ 3608, 3610; they give notice to advertisers and advertising media; and they describe when HUD will exercise this authority to investigate or to refer. 24 C.F.R. § 109.10[6] The regulations not only do not purport to, and they do not, apply to litigation in court, but they fail

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[5] Indeed, Judge Merhige explicitly held in *Saunders*, *supra*, that defendants were not required to include blacks in their advertising proportionate to their percentage in the Richmond metropolitan area.

[6] 24 C.F.R. § 109.10 reads as follows:

> The purpose of these regulations is to assist all advertising media, advertising agencies and all other persons who use advertising to make, print, or publish or cause to be made, printed, or published any advertisement with respect to the sale, rental, or financing of a dwelling, in compliance with the requirements of Title VIII. These regulations also describe the matters this Department will review in evaluating compliance with Title VIII in connection with investigations of complaints alleging discriminatory housing practices involving advertising.

entirely to provide authority regarding the parameters of section 3604(c) when that provision is involved in the context of such litigation.

III

Beyond all of these more or less technical difficulties which plaintiffs have failed to overcome, there is the problem of the practical ramifications of their claims were these to be sustained. That problem suggests that, before the Court could ascribe to the Congress an intention to prohibit, *without more*, advertisements or advertising campaigns featuring models predominantly of one race or one sex, that intention would have to be far more clearly expressed.

First. It could be contended in implementation of plaintiffs' theory, that section 3604(c) requires that, if an indication of a discriminatory preference is to be avoided, a black model must be included in each display, real estate advertisement. Such an interpretation of section 3604(c) would be irrational, for nondiscriminatory as well as discriminatory advertisements would then be within the purview of the statute, inasmuch as publication of a single ad with only white models does not *per se* indicate a discriminatory preference.[7]

In addition to being an overbroad application of section 3604(c), such an interpretation could render impractical advertising with human models, for it would mean that every advertisement made or published would have to include at least one model representative of each minority in the relevant community. Consequently, a housing ad with a broad target market might have to include numerous models, and advertisements featuring only one or

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[7] For example, if such an ad were preceded or succeeded by many ads with a substantial number of black models or only black models, there would plainly be no discrimination.

two models could on that basis alone be regarded as violating section 3604(c). The obvious consequence would be that housing advertisements with human models would become virtually nonexistent.

Second. A narrower interpretation is not more convincing. It may be that plaintiffs are arguing that section 3604(c) requires a proportional representation of blacks in ads, based on the targeted market, for a particular housing project over a period of time.

According to this view of section 3604(c), in order to comply with the FHA, real estate advertisers would be required to make factual determinations regarding the boundaries of their target market in advance of publishing an ad; they would have to determine both how many types of minorities reside in the target market and the proportion of each type of minority to that market; and the precise duration of the advertising campaign for a particular market. Only then would the advertiser be in a position to decide how many models of each minority would have to be placed in each ad or in the several ads over the duration of the advertising campaign in order to meet the goal of proportionality and thus to avoid the indication of a discriminatory preference.

In light of the numerous variables in the real estate market, many of which cannot be predicted in advance, it is the opinion of the Court that the law could not have been intended to require advertisers to make such determinations. Without exact figures and predictions, advertisers could not conceivably determine whether they would, in fact, be in compliance with section 3604(c).

In addition to these immediate practical implications, there is also the broader problem of the chilling effect of such burdens on advertisers' ability and desire to advertise, implicating First Amendment concerns. *See generally Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980); *Virginia State Board of*

Pharmacy v. *Virginia Citizens Council, Inc.*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

For these reasons, the Court would not be justified in construing section 3604 as establishing a flat rule requiring the use in ads of models of a particular race or sex in particular proportions. When the Congress prohibited advertisements that indicate a discriminatory preference, it could only have intended that the preference be either obvious from the ad itself (as in the *Hunter* case, *supra*) or that such preference be ascertainable through extrinsic circumstances (as in *Saunders, supra*). Usually the proof of such extrinsic circumstances will implicate an element of discriminatory intent. Where such intent is demonstrated, a case would be made out under the Fair Housing Act regardless of the proportion of white to black models in one ad or a series of ads. The Court holds, therefore, that absent a showing of intent to indicate a racial preference or of other extrinsic circumstances revelatory of a racial preference, real estate advertisements do not violate the Fair Housing Act merely because models of a particular race are not used in one ad or a series of ads.

It should be well understood, however, that this does not mean that discriminatory intent would necessarily have to be proved by direct evidence. Such intent could be inferred, for example, by evidence of prior or concurrent discriminatory advertising practices of the defendant, in particular if a challenge to such practices had previously been brought to his attention. A determination regarding the statutory violation would of course have to be made on the facts of the particular case.

IV

It is unnecessary to determine here whether defendants had the intent to indicate discriminatory preferences through their ads or ad campaigns over the entire period at issue, since the record clearly shows that, under any

test, neither defendant possessed the requisite intent during the limitations period set forth in the FHA, *see* 42 U.S.C. § 3612(a), and that, indeed, neither defendant's ads or ad campaigns indicated a racially discriminatory preference during that period under any standard.

In order to bring a civil action under the Fair Housing Act, a plaintiff must file his complaint in court within 180 days after the alleged discriminatory housing practice—here discriminatory advertising—occurred. 42 U.S.C. § 3612(a). With respect to Colonial, the relevant period of inquiry therefore is from April 26, 1986 to October 23, 1986, the latter marking the date plaintiffs filed their complaint against Colonial. During that period, over twenty-eight percent of Colonial's ads published in *The Post* featured black models. The population of the Washington metropolitan area is approximately twenty-seven percent black. Clearly, then, Colonial's advertising campaign for that period cannot be said to indicate a discriminatory preference or an intention to make such a preference. This conclusion is strengthened by the fact that in April 1986 Colonial adopted a written policy that appears to reflect Colonial's commitment to equal housing opportunity and that specifically requires nondiscriminatory selection of models for its advertisements.

The relevant period of inquiry with respect to Gerstin is from May 24, 1986 to November 20, 1986. Forty percent of Gerstin's ads published in *The Post* during that time period featured one or more black models. As with Colonial, Gerstin's ads during that relevant period did not indicate a discriminatory preference or an intent to make such a preference. In brief, there was no conceivable violation by either defendant during any period not barred by the statute of limitations. For the reasons stated, the Court will grant the motions to dismiss the FHA claims of both defendants.

V

Both defendants have also moved to dismiss the section 1981 and 1982 claims for failure to state claims upon which relief can be granted. That issue may be disposed of more briefly.

Section 1981 provides that all persons shall have the right to enjoy the "full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens," 42 U.S.C. § 1981, and section 1982 provides that all citizens shall have equal rights to purchase, sell, hold and convey real and personal property, regardless of color or race. Plaintiffs claim that defendants' advertising practices violate these provisions in that they deter blacks from applying to lease or purchase property in the advertised developments and that they thereby effectively at the very outset interfere with the opportunity of blacks to purchase or lease property.

Not only does the language of sections 1981 and 1982 fail to refer to advertising in conjunction with real property, an examination of the precedents clearly indicates that no claim has been stated under either section 1981 or section 1982.

Plaintiffs have cited no decided case, and the Court has found none, suggesting that either section 1981 or section 1982 provides a cause of action for advertising that may indicate a racially discriminatory preference. To the contrary; the Supreme Court has explicitly stated that "[section 1982] does not prohibit advertising or other representations that indicate discriminatory preferences." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).[8] *See also Saunders, supra.*[9]

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[8] Since, as plaintiffs correctly note, the scope of section 1981 parallels the scope of section 1982, *see Runyon* v. *McCrary*, 427 U.S. 160, 170-

Plaintiffs argue that, notwithstanding the Supreme Court's statement in *Jones*, they are entitled to prevail because an all-white advertising constitutes "steering," the practice of directing prospective black tenants and purchasers away from "white" housing developments. *See McDonald* v. *Verble*, 622 F.2d 1227 (6th Cir. 1980). However, again, not a single case is cited holding or intimating that an advertising practice constitutes "steering." Steering has generally been found to exist only where there has been rejection or denial of the opportunity to purchase or rent housing to a minority applicant. *See, e.g., Marable* v. *M. Walker & Associates*, 644 F.2d 390 (5th Cir. 1981); *Johnson* v. *Jerry Pals Real Estate*, 485 F.2d 528 (7th Cir. 1973). Plaintiffs here have not claimed, nor could they claim, that they have been denied the opportunity to purchase or rent a housing unit by the defendants. For the reasons stated, the section 1981 and 1982 claims must also be dismissed.

An order consistent with the above is being issued herewith.

May 22, 1987

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

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71 (1976), the Supreme Court's statement in *Jones* pertaining to section 1982 applies with equal force to section 1981.

[9] Moreover, there is nothing in the legislative history of sections 1981 and 1982 to indicate that those statutes were intended to prohibit discriminatory advertising. In fact, as discussed above, Congress felt it necessary, subsequent to the enactment of sections 1981 and 1982, to enact the Fair Housing Act with the objective, *inter alia*, of prohibiting advertising indicating or intended to make a discriminatory preference. 42 U.S.C. § 3604(c).

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2917

GIRARDEAU A. SPANN, et al.,

Plaintiffs,

v.

COLONIAL VILLAGE, INC.,

Defendant.

Civil Action No. 86-3196

GIRARDEAU A. SPANN, et al.,

Plaintiffs,

v.

MARVIN J. GERSTIN, et al.,

Defendants.

Civil Action No. 86-3268

GIRARDEAU A. SPANN, et al.,

Plaintiffs,

v.

HOWARD BOMSTEIN, et al.,

Defendants.

FILED

MAY 22 1987

CLERK, U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA

ORDER

In accordance with the Opinion issued contemporaneously herewith, it is this 22nd day of May, 1987

ORDERED that defendant Colonial and defendant Gerstin's motions for summary judgment with respect to plaintiffs' claims under the Fair Housing Act, 42 U.S.C. § 3604(a) and (c), be and they are hereby granted; and it s further

ORDERED that defendant Colonial's and defendant Gerstin's motions to dismiss plaintiffs' claims pursuant to 42 U.S.C. §§ 1981 and 1982 be and they are hereby granted; and it is further

ORDERED that plaintiffs' breach of contract claim be and it is hereby dismissed without prejudice for lack of subject matter jurisdiction; and it is further

ORDERED that, as a result of the granting of defendant Colonial's and defendant Gerstin's motions to dismiss or, in the alternative, for summary judgment, the following motions be and they are hereby denied as moot:

(1) Gerstin's Motion to Strike Declarations;

(2) Plaintiffs' Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment;

(3) Gerstin's Motion to Strike, Seal or Expunge and In Limine;

(4) Plaintiffs' Motion for Disqualification of Counsel; and

(5) Colonial's Motion to Strike the "Related Case" Designations by Plaintiffs;

and it is further

ORDERED that these consolidated cases be and they are hereby dismissed.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2917

GIRARDEAU A. SPANN, *et al.*,

Plaintiffs,

v.

COLONIAL VILLAGE, INC.,

Defendant.

Civil Action No. 86-3196

GIRARDEAU A. SPANN, *et al.*,

Plaintiffs,

v.

MARVIN J. GERSTIN, *et al.*,

Defendants.

Civil Action No. 86-3268

GIRARDEAU A. SPANN, *et al.*,

Plaintiffs,

v.

HOWARD BOMSTEIN, *et al.*,

Defendants.

FILED

OCT 13 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM AND ORDER

On May 22, 1987 this Court dismissed two of the above-captioned consolidated cases.[1] Plaintiffs Girardeau A. Spann, et al., appealed and on July 1, 1988, the Court of Appeals dismissed the appeal on the ground that a final order from this Court was wanting. In this Memorandum, the Court addresses two remaining motions, the resolution of which makes judgment in these cases final. The Court will consider in turn defendant Mobile Land Development Corporation's (Mobil) motion to dismiss or quash service of process and the motion by defendants Marvin J. Gerstin, et al., for Rule 11 sanctions against plaintiffs. Fed. R. Civ. P. 11.

I

Plaintiffs attempted proper service on Mobil in several ways, the one of which proved satisfactory. On three occasions plaintiffs tried to serve Mobil by mail, once by personal service in New York, and once by serving Mobil's wholly owned subsidiary Colonial Village, Inc. The last method effected service on Mobil.

It seems that plaintiffs first tried to serve Mobil with a summons and complaint at an address in Virginia, a mailing that defendant did not acknowledge. Likewise, Mobil did not sign and return the acknowledgement and receipt forms for the second and third mailings, which went to a New York address and which were sent on December 19, 1986, and January 20, 1987.

[1] The third case was dismissed by stipulation of the parties.

Plaintiffs' contention that the third mailing, the second to the same address in New York, simultaneously satisfied the D.C. long-arm service procedures is not well taken. Rule 4(c)(2)(C)(i), permitting service in accordance with state law, is available as an alternative to Rule 4(c)(2)(C)(ii) only in the first instance; they may not be used sequentially. *Id.* at 444-448.

On February 19, 1987, plaintiffs made a fourth attempt to serve Mobil directly, this time by personal service, but service was not made within the territorial limits of the District of Columbia, *see* Fed. R. Civ. P. 4(f), and there is no federal statute or rule generally authorizing extra-territorial service in actions under the 1866 Civil Rights Act or the Fair Housing Act. *See Omni Capital International, et al.* v. *Rudolf Wolff & Co., Ltd, et al.*, 98 L.Ed.2d 415, 425 (1987).

Mobil concedes, however, that service was effective on Colonial Village, Inc., its wholly-owned subsidiary. Plaintiffs contend that since Colonial Village holds itself out to the public as "a Mobil company," that service on it effected service on Mobil. They are correct. Certainly one corporation or business organization can be "the agent of another corporation so that service on an . . . agent of one organization can be valid service on another." 4A C. Wright & A. Miller, *Federal Practice and Procedure* § 110 at 123 (1987); *see also Heiss* v. *Olympus Optical Co.*, 111 F.R.D. 1, 6 (N.D. Ind. 1986) (citing cases). Mobil conducts business in this jurisdiction, in many ways, including through Colonial Village, whose employees expressly hold themselves out as agents of Mobil. They list the parent corporation on their business cards and advertise Mobil's control of the property. *See, e.g., Price* v. *Griffin*, 359 A.2d 582, 586 (D.C. App. 1976); *see also Dunn Appraisal* v. *Honeywell Information Systems*, 687 F.2d 877, 881 (6th Cir. 1982).

In this vein, "notice seems to be the keystone to proper service." 4A C. Wright & A. Miller, *Federal Practice and Procedure* § 1101 at 105. It is quite obvious that the parent company Mobil had actual notice of this action, as it concedes at this point. Consequently, service was properly effected on Mobil.

II

On July 13, 1987, over one month after defendants Gerstin, et al., filed their appeal in this action, they moved for Rule 11 sanctions against plaintiffs premised on a number of claims which struggle to find fault with plaintiff's legal representations. Some of the requests for sanctions are preposterous, such as the assertion that plaintiffs' intended to frustrate the litigation they instigated, or to lay a foundation for a future request for an extension of time, by allowing an attorney to file a complaint who anticipated withdrawing from the case. Equally absurd is the claim that the Court should impose sanctions on plaintiffs for "delaying" this action because they requested that the action be consolidated with like actions and then moved to disqualify counsel in one of the other cases. There is nothing unusual or improper about this.

Other charges by defendants as grounds for Rule 11 sanctions are similarly without merit. The assertions made by plaintiffs in their complaint and contested by defendants do not lack a reasonably defensible basis in fact or law. For example, defendants contend that their advertising during the 180 days prior to the filing of the complaint does not indicate a racial preference, and that the complaint is therefore without basis in fact. In fact, however, the complaint of racial preference in defendants' ads is not limited to that time period. Only the last asserted occurrence of a practice of racial preference need be in that 180 day period. In its Opinion of May 22, 1987, the Court found that the last of defendants' all-white ads was

published within the 180 day limitation period beginning on May 24, 1986.

Defendants also contend that plaintiffs deliberately overread regulations of the Department of Housing and Urban Development in order to cause the Court to believe that they required advertising models to represent majority and minority groups in the metropolitan area, when the regulations are merely safe harbors. Defendants do not cite any case law that these regulations are not intended to have the force of law or to govern in this litigation. The regulations are of course entitled to substantial deference by the Court when interpreting that Fair Housing Act, *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 107 (1979), and plaintiffs can, at a minimum, argue as much. In short, the requests for sanctions are frivolous, and to grant them would be to chill respectable though novel advocacy.

Consequently, it is this 13th day of October, 1988

ORDERED that defendant Mobil's motion to dismiss or quash service of process be and it is hereby denied; and it is further

ORDERED that the motion of the Gerstin defendants for sanctions be and it is hereby denied.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX I

[EXCERPTS FROM DISTRICT COURT RECORD]

AFFIDAVIT OF DALE R McGINLEY

* * *

3. From January 1 through April 24, 1986, three prototype advertisements for the Colonial Village project were published in the Washington *Post* and these appeared a total of nine times. Copies of these ads are attached as Exhibits B, C and D. During 1985, three similar prototype ads for Colonial Village were published in the Washington Post and appeared a total of 22 times.

4. From April 24, 1986, until October 23, 1986, four prototype advertisements for Colonial Village were published in the Washington Post a total of fourteen times. These included ads with text and photos similar to Exhibits B, C and D and also included the prototype attached as Exhibit E. 28.6% of all the ads appearing in the Post for Colonial Village during the 180 days prior to October 23, 1986 featured a black model.

5. From April 24, 1986 through today, a total of twenty-two ads for Colonial Village have been published in The Washington Post. Of these, 36.4% have featured black models.

6. Before the OHR and HUD complaints were filed, the management of Colonial Village was not aware of any racial imbalance in the models shown in our ads. None of the plaintiffs ever contacted us and we received no complaints about the ads prior to that time. The matter of a racial preference in advertising had never been discussed at all in our company.

7. None of the ads for Colonial Village have contained any statement indicating or suggesting a racial preference.

8. To the best of my knowledge and belief, every advertisement published for Colonial Village in the Washington Post since at least January 1985 to date has included the words "EQUAL HOUSING OPPORTUNITY" and an "EHO" logo suggested by HUD as a symbol to indicate nondiscrimination in housing.

9. Colonial Village has never given any instruction or made any suggestion to our advertising agency that a racial preference should be indicated in advertisements for the project or that models for the ads should be selected on a discriminatory basis. While we have reviewed and approved the advertising themes and concepts proposed by our agency, as well as the specific prototypes to be used from time to time, Colonial Village has had no role at all in the actual selections of models. Moreover, it would be absolutely contrary to our company policies and purposes either to utilize or to request discriminatory or racially preferential ads.

* * *

13. The management of Colonial Village, Inc. has never had any dealings with any of the plaintiffs other than in connection with their various complaints starting on April 24, 1986. In fact, it is fair to say that we had never heard of any of them. Certainly none of our activities or conduct were ever directed toward nor intended in any way to injure the plaintiffs personally or in their organizational capacity.

14. Apparently the plaintiffs were monitoring our ads continuously since January, 1985. If they had expressed their concerns to us at any time that the models in our photographs did not reflect a proper racial balance, the problem could and would have been resolved by our company. There would have been no need for any complaints to OHR or HUD, nor any litigation in the federal courts, and the plaintiffs could have spared themselves the outrage

and upset about which they complain. In fact, as soon as this issue was drawn to our attention, the Colonial Village management did promptly act to end any conceivable basis for complaint.

[SIGNATURE AND NOTARIZATION OMITTED IN PRINTING]

* * *

DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

In support of its motion for summary judgment, defendant Colonial Village, Inc. submits that no genuine dispute exists as to the following facts:

* * *

8. Months before the complaint was filed in this case, defendant had established a written policy to insure non-discriminatory selection of models for its advertisements and had notified its advertising agency of such policy. . . .

9. The defendant's management was unaware of any racial imbalance in the models pictured in its advertisements before the OHR and HUD complaints were filed by plaintiffs in April, 1986. . . .

10. Defendant does not select the models for its advertising. It has never given any instruction or suggestion to its advertising agency that a racial preference should be indicated in the advertisements for Colonial Village or that models should be selected for the ads based on their race. . . .

* * *

RESPONSE OF PLAINTIFFS TO COLONIAL VILLAGE'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

Pursuant to Local Rule 108(b), plaintiffs respond to Colonial Village's Statement Of Material Fact As To Which There Is No Genuine Issue as follows:

* * *

7. the factual assertions in paragraphs 8-10 of Colonial Village's Statement of Material Facts are not material to the issue of liability in this case. To establish Colonial Village's liability under the Fair Housing Act plaintiffs need not show either the discriminatory intent or direct supervision of Colonial Village in causing to be made and published all-white human model ad campaigns. * * *

AFFIDAVIT OF DENNIS H. BLOOMQUIST

* * *

2. MLDC [Mobil Land Development Corporation] is a Delaware corporation, duly organized and registered with its principal place of business in New York, N.Y. MLDC does not maintain an office or other facilities in the District of Columbia nor is MLDC registered as a foreign corporation in the District of Columbia. MLDC does not have a registered agent in the District of Columbia. MLDC has no officers, agents or employees working or residing in the District of Columbia. MLDC is not listed in the District of Columbia telephone directory.

3. MLDC has not in the past engaged and does not now engage in any sales of services or products in the District of Columbia and does not regularly do or solicit business in the District of Columbia.

4. MLDC does not pay District of Columbia taxes.

5. MLDC does not derive any revenue from services rendered or products sold in the District of Columbia.

6. MLDC does not have an interest in, use or possess real property in the District of Columbia.

7. MLDC has not engaged in any meetings or activities in the District of Columbia relating in any way to Colonial Village, Inc. or Colonial Village condominiums.

8. MLDC owns all of the stock of Colonial Village, Inc., a Delaware corporation. Colonial Village, Inc. has its own Board of Directors and its own officers, who are responsible for the management and operation of that corporation.

9. MLDC does not own or manage the condominium project known as Colonial Village in Arlington, Virginia, and MLDC has no involvement in the format, content, placement or frequency of the advertising for such property.

* * *

[Signature and Notarization Omitted In Printing]

DECLARATION OF REUBEN B. ROBERTSON

* * *

2. Shortly after the complaint was filed in this case, I was requested by counsel for the plaintiffs to accept service of process. I notified my clients of such request and was authorized to accept service for Colonial Village, Inc. only. I informed plaintiffs' counsel that I could receive service for Colonial Village, Inc. but was not authorized to accept service of process for MLDC and would not do so.

3. Exhibit 1 is a true copy of the summons which I received from plaintiffs' counsel by mail on Wednesday, November 12, 1986, together with a copy of the complaint. This summons identifies only Colonial Village, Inc. as the defendant to which the summons is directed. I did not receive any other summons from the plaintiffs or their attorneys.

4. Exhibit 2 is a true copy of the "Notice and Acknowledgment of Receipt of Summons and Complaint," which accompanied the summons and was received by me on November 12, 1986. This form identifies only Colonial Vil-

lage, Inc. as the defendant to which the service is directed. I did not receive any other notice and acknowledgment of service from the plaintiffs or their attorneys.

5. I executed the notice and acknowledgment of service form, Exhibit 2, and returned it on behalf of Colonial Village, Inc. only. Had I been advised that service was being attempted on MLDC by this form, I would not have executed it since I was not authorized to do so.

6. I am not and have never been an officer or a managing or general agent of MLDC, nor have I been otherwise authorized to receive service of process on its behalf.

[Verification and Signature Omitted In Printing]

Nos. 90-201, 90-202, 90-205

Supreme Court, U.S.
FILED
NOV 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

COLONIAL VILLAGE, INC., MOBIL LAND DEVELOPMENT CORPORATION, and MARVIN J. GERSTIN and MARVIN GERSTIN ASSOCIATES, INC.,
Petitioners,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court grant certiorari to consider an interlocutory decision that the complaint was timely filed, when that decision directly followed this Court's timeliness decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and the issue has no implications beyond a very narrow group of Fair Housing Act cases?

2. Should this Court grant certiorari to consider an interlocutory decision that the complaint states a claim under the Fair Housing Act, when the longstanding regulations of the Department of Housing and Urban Development interpret the Act to support plaintiffs' claims and when there is no contrary circuit court precedent?

3. Should this Court grant certiorari to consider an interlocutory constitutional challenge to the Fair Housing Act when plaintiffs' claims were remanded for discovery and trial without any discussion of defendants' constitutional arguments, which were not emphasized by the defendants below and which have not yet been addressed by any appellate court?

4. Should this Court grant certiorari to consider an interlocutory challenge raising a host of fact-bound, procedural defenses to plaintiffs' claims, when the application of those defenses to the unique facts of this case has no general significance, and when those defenses may become moot after discovery and trial?

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REGULATORY PROVISIONS

Respondents supplement the omission from petitioners' briefs of the regulations of the United States Department of Housing and Urban Development, 24 C.F.R. Part 109, which provide in relevant part as follows:

Part 109—Fair Housing Advertising

* * * *

§ 109.25 Selective use of advertising media or content.

The selective use of advertising media or content when particular combinations thereof are used exclusively with respect to various housing developments or sites can lead to discriminatory results and may indicate a violation of the Fair Housing Act. Similarly, the selective use of human models in advertisements may have discriminatory impact. The following are examples of the selective use of advertisements which may be discriminatory:

* * * *

(c) Selective use of human models when conducting an advertising campaign. Selective advertising may involve an advertising campaign using human models primarily in media that cater to one racial or national origin segment of the population without a complementary advertising campaign that is directed at other groups. Another example may involve use of racially mixed models by a developer to advertise one development and not others.

§ 109.30 Fair Housing policy and practices.

* * * *

(b) Use of human models. Human models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness because of

race, color, religion, sex, handicap, familial status, or national origin. If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area, both sexes, and when appropriate, families with children. Models, if used, should portray persons in an equal social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, handicap, familial status, or national origin, and is not for the exclusive use of one such group.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 90-201, 90-202, 90-205

COLONIAL VILLAGE, INC., MOBIL LAND DEVELOPMENT CORPORATION, and MARVIN J. GERSTIN and MARVIN GERSTIN ASSOCIATES, INC.,
Petitioners,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Respondents [1] respectfully supplement petitioners' Statements Of The Case as follows:

---

[1] The respondent fair housing organizations are non-profit corporations which have no parent or subsidiary affiliates.

1. Because of the procedural history of this case, the factual record is almost entirely undeveloped. The district court dismissed plaintiffs' claims at a very early stage of litigation, prior to any discovery. Less than a month after the complaints were served in November 1986, the defendants began filing motions to dismiss raising various threshold defenses. Before setting up a discovery schedule, the district court established a briefing schedule to resolve those preliminary motions. In addition to filing a substantive opposition, plaintiffs filed an affidavit pursuant to Federal Rule of Civil Procedure 56(f) specifying their obvious need to conduct discovery on the merits and articulating some of the facts they expected to adduce in support of their claims, including evidence of the full scope of defendants' racially exclusive advertising practices and "the intent and ill will of defendants in publishing all-white human model ad campaigns" despite "the longstanding HUD regulations warning against this type of advertising." The district court never considered that Rule 56(f) affidavit, however, because it ruled that plaintiffs' claims were time-barred under the statute of limitations and dismissed plaintiffs' claims on that narrow ground without reaching the merits. As a result, to this day most of the defendants have not filed an answer and plaintiffs have not had any discovery. Thus, the factual record is ill-suited to plenary review by this Court of the broad legal issues petitioners seek to raise on interlocutory review.

2. Because there has been no discovery, the full scope of defendants' racially exclusive advertising practices prior to May of 1986 has not yet been ascertained. Petitioner Colonial Village, Inc. ("Colonial") errs in suggesting that plaintiffs' case against Colonial is limited to the 31 all-white advertisements which it ran in 1985 and early 1986. *See, e.g.*, Colonial Village's Petition For A Writ of Certiorari at 5 (discussing only ads published during 1985 and 1986). The complaint was not so limited, but rather alleged that "not one of Colonial

Village's pictorial advertisements published prior to May 15, 1986, depicted a black human model, while a large number of white human models were portrayed in those same ads." Colonial Complaint at ¶ 9. On remand plaintiffs will seek to prove that Colonial Village's racially exclusive advertising dates back to at least 1983, involving many more all-white ads than Colonial currently admits. Similarly, the complaint against Marvin J. Gerstin and his advertising agency is not limited to advertisements published in 1985 and early 1986, but rather alleges that since 1973 those defendants continuously used racially exclusive advertising, and violated a 1976 Conciliation Agreement with the United States Department of Housing and Urban Development and one of the plaintiffs requiring integrated advertising. Gerstin Complaint at ¶¶ 10-15.

3. As the petitioners concede, their major argument in the district court did not concern the merits of plaintiffs' claims. Rather, they relied primarily on the affirmative defense that plaintiffs' Fair Housing Act claims should be dismissed under the statute of limitations because the defendants had ceased their racially exclusive advertising during the last 180 days before the filing of the complaint and the overall statistics for that period showed that defendants had begun to depict black persons in their ads. Plaintiffs did not dispute below that the defendants began integrating their ads for the first time after plaintiffs filed administrative complaints, but before settlement discussions ceased and plaintiffs were forced to file the federal complaints.[2] The defendants in-

[2] Although petitioners accuse plaintiffs of bringing these claims as part of a "profitable cottage industry of suing real estate developers, advertising agencies and newspapers" rather than for the vindication of civil rights, *see, e.g.*, Colonial Petition at 18 n.8, in fact before plaintiffs filed their complaints in federal court they offered to settle all their monetary claims in each of the two cases in which certiorari is now being sought, including attorneys' fees and costs, for $3,000 or less.

troduced no evidence contesting plaintiffs' allegations that defendants had engaged in a long, continuing practice of excluding black human models from their real estate advertising campaigns, dating back many years. Moreover, plaintiffs introduced an affidavit demonstrating that the defendants' racially exclusive advertising practices (i.e. defendants' *uninterrupted* stream of all-white advertisements) continued into the 180-day statute of limitations period by at least one day.[3]

4. In response to the defendants' statute of limitations defense, plaintiffs relied on this Court's controlling decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-381 (1982), which provides that a Fair Housing Act claim challenging a "continuing violation manifested in a number of incidents" is timely so long as the complaint is "filed within 180 days of the last asserted occurrence of that practice." Without even mentioning this Court's *Havens* decision or the plaintiffs' continuing violation theory, the district court held that "there was no conceivable violation by either defendant during any period not barred by the statute of limitations." App. at 39a. Inexplicably, the district court disregarded the undisputed evidence that "the last of the long stream of all white ads . . . occurred within the 180-day zone." App. at 20a. On appeal, the D.C. Circuit properly reversed the district court for failing to follow this Court's "last asserted occurrence" rule set out in *Havens* for applying the Fair Housing Act's statute of limitations to a complaint alleging a continuing violation. *Id.* Indeed, the court of appeals noted that the district court itself in a subsequent decision "appeared to recognize . . . that its initial time-bar decision bore reexamination." App. at 20a-21a n.9.

---

[3] Both the district court and the court of appeals found in plaintiffs' favor on this fact issue. *See* 899 F.2d at 35, Appendix To Petitions (App.) at 20a-21a & n.9; App. at 32a-33a, 48a-49a.

5. Colonial erroneously asserts that its petition properly presents the legal issue whether discriminatory intent must be shown in order to state a claim under Section 804(c) of the Fair Housing Act, 42 U.S.C. § 3604(c). Colonial Petition at 19. In fact, Colonial waived that issue in the court of appeals by arguing on appeal that "*The District Court Did Not Impose Any Requirement That Plaintiffs Prove Discriminatory Intent To Establish Their Claim Under Title VIII*" and thus that the issue whether plaintiffs' claim require proof of discriminatory intent was "irrelevant and unnecessary to the appeal." Brief for Defendants-Appellees Colonial Village, Inc. and Mobil Land Development Corporation at 20 (emphasis in original). Given its position before the D.C. Circuit that the issue of discriminatory intent was not reached by the district court and was otherwise irrelevant, it is improper for Colonial now to seek review by this Court on the ground that the district court held that "an element of discriminatory intent had to be proved in a section 804(c) action" and that the court of appeals purportedly erred by not affirming that holding. Colonial Petition at 10.

6. Colonial's petition for review of the statute of limitations issue relies heavily on a factual misstatement. Before this Court, Colonial argues *for the first time* that plaintiffs' claim is untimely because "[a]lthough an ad for Colonial picturing a white couple did appear in the newspaper on the 180th day before the complaint, that was simply the automatic consequence and effect of campaign planning and media placement decisions and arrangements that necessarily occurred prior to that date." Colonial Petition at 21; *id.* at 14 (same argument), 23 (same argument). In truth, Colonial never introduced any evidence below to support this factual assertion and never even raised this issue before either the district court or the court of appeals. Instead, it relied solely on the overall statistics concerning its advertising published within the 180-day limitations period as a whole.

7. Colonial's petition for review of the standing issue relies on factual misstatements. Colonial states that "the only basis for standing alleged by this plaintiff is that he was 'offended' by the real estate ads he saw in *The Washington Post* and 'incurred indignation' and 'distress' as a result." Colonial Petition at 25. To the contrary, the complaint also alleges that Mr. Spann "has been looking for housing in the District of Columbia metropolitan area during the period covered by this Complaint" and that as a result of Colonial's racially preferential ads he has been deprived of his right "to obtain housing on an equal basis with other persons regardless of race." Colonial Complaint at ¶¶ 4, 16. Colonial also baldly asserts that "as a long time resident of Washington, D.C. [Mr. Spann] does not claim to live in or near the neighborhood in which the project is located in Virginia." Colonial Petition at 25. Colonial's own ad, however, states the project is "Right next door to D.C. in Rosslyn." *Id.* at 4, 5. (Other Colonial ads have stated that the project is "just across the bridge from Georgetown" and that "it's only a minute from the Key Bridge" into D.C.).

8. Colonial waived below the right to argue to this Court that the court of appeals erred in its alternative holding that it " 'could not resolve' the individual plaintiff's standing without a remand permitting him to amend the complaint or to supplement the record in the district court." Colonial Petition at 27 n.13. Although Article III standing is a fundamental jurisdictional requirement that can never be waived by a party to the litigation, a party can waive objections to the discretionary decision of a court to postpone decision on standing pending further development of the record. *See generally Havens*, 455 U.S. at 377-378; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 112-113 n.25 (1979). Before this Court, Colonial criticizes the court of appeals on the ground that the standing allegations in the complaint concerning Mr. Spann were allegedly "pat-

ently inadequate" to survive summary judgment and thus it was an abuse of discretion for the court of appeals to remand the standing issue. Colonial Petition at 28 n.13. The record shows, however, that Colonial did not move for summary judgment against Mr. Spann for lack of standing and in no way challenged Mr. Spann's standing before the district court or the court of appeals. As a result, Colonial has waived any objection to the court of appeal's decision that resolution of Mr. Spann's standing requires further development of the record. *Gladstone*, 441 U.S. at 113 n.25.

9. Mobil Land Development Corporation ("Mobil Land") seeks certiorari review of an alleged "decision of the court of appeals . . . allow[ing] the assertion of federal jurisdiction, without service of process ever having been made directly upon MLDC and without any showing that such service was even authorized by statute or rule, simply on the grounds that service was made on [Mobil Land's] co-defendant subsidiary." Mobil Land Petition at 17-18 (footnote omitted). In fact, the court of appeals entered no such ruling. Rather, the Court concluded that the record was too "thin" to allow the Court to "review intelligently" the issue, and remanded to the district court for further proceedings on the question. App. at 18a. The court of appeals noted the plaintiffs had requested an opportunity below for discovery of Mobil Land on the service issue, *id.* n.5, and left it to the district court to determine whether discovery of Mobil Land should precede any ruling on that entity's motion challenging the sufficiency of service. App. at 18a.

10. Mobil Land also bases its petition for certiorari on another significant misstatement of fact. Mobil Land asserts that "[p]laintiffs did not appeal the district court's determination that none of their efforts to make service directly on [Mobil Land] in Virginia and New York had been effective." Mobil Land Petition at 10 n.4. In fact, the plaintiffs' notice of appeal clearly stated that the ap-

peal was from both the district court's May 22, 1987 order and its October 13, 1988, final judgment in which the court made that specific determination. Moreover, in response to Mobil Land's motion to dismiss the appeal, the plaintiffs fully briefed for the court of appeals why the district court was incorrect in finding that proper service had not been effected directly on Mobil Land. Contrary to Mobil Land's suggestion to this Court, if review were granted, this Court would be called upon to review the question whether any of plaintiffs' four attempts to serve Mobil Land directly was valid and, in the alternative, whether plaintiffs should be allowed to attempt service again because of Mobil Land's refusal to accept service by mail.

11. The petition for review of Marvin J. Gerstin and Marvin Gerstin Associates, Inc. ("Gerstin") incorrectly claims that this case presents the issue whether the court of appeals lacked jurisdiction because plaintiffs allegedly failed to file a timely notice of appeal. It is undisputed that plaintiffs filed their first notice of appeal in a timely manner from the district court's original May 22, 1987, Opinion and Order. Gerstin Petition at 6. Thus, even if the court of appeals erred in holding that plaintiffs' first appeal was premature with respect to the Gerstin case, that would not create a jurisdictional defect since the plaintiffs did timely appeal. Because the plaintiffs filed a timely notice of appeal from each of the two orders of the district court, the circuit cases cited by Gerstin as allegedly in conflict have no relevance to this case.

12. Finally, the most misleading aspect of the Colonial and Gerstin petitions is their failure to inform the Court of the directly applicable regulations of the United States Department of Housing and Urban Development reproduced at the beginning of this opposition brief. 24 C.F.R. § 109. As discussed *infra* at pages 10-14, those regulations expressly interpret Section 804(c) to prohibit the use of human models in housing ads to indicate racial exclusiveness and directly support respondents' claims here.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE HOLDING OF *HAVENS* AND PROPERLY UPHELD THE SUFFICIENCY OF PLAINTIFFS' ALLEGATIONS

The D.C. Circuit faithfully applied this Court's holding in *Havens Realty Corp v. Coleman*, 455 U.S. 363, 380-381 (1982), in concluding that plaintiffs' allegations of a continuing violation of the Fair Housing Act were not time-barred. Given the federal regulations interpreting the Fair Housing Act to support the viability of plaintiffs' claims and the lack of any contrary circuit precedent, the court of appeals' unexceptional application of controlling precedent presents no issues worthy of review in this Court.

A. The D.C. Circuit Correctly Applied *Havens*

In *Havens* this Court directly addressed the question of how the statute of limitations should be applied to claims under the Fair Housing Act challenging "a continuing violation manifested in a number of incidents." 455 U.S. at 381. Recognizing that a "continuing violation" of the Fair Housing Act should not be treated in the same manner as one discrete act of discrimination, this Court held that

> where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice.

Id. (footnote omitted).

As the court of appeals correctly recognized, a *Havens*-type "continuing violation" was alleged in this case. Plaintiffs here have challenged defendants' continuing practice of excluding black persons from pictures portraying residents in their real estate ads, manifested in

an uninterrupted series of all-white advertisements published weekend after weekend for many years. Application of the *Havens* rule to the facts here compelled the court of appeals' conclusion that plaintiffs' complaints were timely: "In each case, the last of the long stream of all white ads, plaintiffs allege, occurred within the 180-day zone . . .; thus, under the " 'continuing violation'/'last asserted occurrence' theory that the Supreme Court has advanced, . . . the plaintiffs claims are not time-barred." App. at 20a (footnote omitted).

Notwithstanding this Court's controlling precedent in *Havens*, petitioners contend that the result required by *Havens* is somehow inconsistent with the Court's decision in *Lorance v. AT&T Technologies, Inc.*, 109 S.Ct. 2261 (1989). That decision, however, is inapposite. *Lorance* held only that a plaintiff who seeks to assert a claim that is "wholly dependent on discriminatory conduct occurring well outside the period of limitations . . . cannot complain of a continuing violation." 109 S.Ct. at 2267. Here, to the contrary, plaintiffs have identified specific, concrete "discriminatory acts" that occurred within that period—the publication of one or more of a long-running series of racially exclusive ads. As *Havens* itself recognized, the entire continuing violation does not have to occur within the limitations period but rather only "the last asserted occurrence of that practice." 455 U.S. at 381.

B. Plaintiffs' Discriminatory Advertising Claims Are Plainly Sufficient To Survive A Motion To Dismiss

Petitioners have erroneously suggested to this Court that the court of appeals lacked any legal authority or precedent when it interpreted Section 804(c) of the Fair Housing Act to prohibit the use of human models in housing ads to indicate a racial preference. *See* Colonial Petition at 15-20; Gerstin Petition at 16-18. In fact, that decision had ample legal authority, both in the HUD regulations and the case law. The court of appeals did

nothing more than allow plaintiffs' claims to proceed on the uncontroversial premise that a reasonable jury could find that the consistent exclusion of black human models from real estate advertising in a metropolitan area over one-fourth black indicates a racial preference.

Petitioners failed to advise this Court that since 1972 the United States Department of Housing and Urban Development has expressly interpreted Section 804(c) to apply to the use of human models in real estate advertising. *See* 37 Fed. Reg. 6700 (1972). In 1980, after notice and comment, HUD reissued its advertising guidelines as formal regulations in order to help fulfill "the recognized need for a regulatory scheme to interpret and implement the Fair Housing Act of 1968." 45 Fed. Reg. 57,102 (1980). Those regulations provide that human models "may not be used to indicate exclusiveness on the basis of race [or] color" and "should be clearly definable as reasonably representing majority and minority groups in the metropolitan area." 45 Fed. Reg. 57,107 (1980), *codified at* 24 C.F.R. § 109.30(b); *see also* 24 C.F.R. § 109.25(c) (discussing examples of the discriminatory use of human models in violation of Section 804(c)). *See generally* Note, *Advertising and Title VIII: The Discriminatory Use of Models in Real Estate Advertisements*, 98 Yale L.J. 165, 169 (1988) (concluding that HUD regulations "clearly put housing advertisers on notice that section [8]04(c) regulates the use of human models in real estate advertisements").

Because HUD is "the federal agency primarily assigned to implement and administer" the Fair Housing Act, its "interpretation of the statute ordinarily commands considerable deference." *Gladstone*, 441 U.S. at 107; *see also Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972). The statutory language of Section 804(c) broadly prohibits all forms of racially discriminatory advertising practices and makes no exception for the use of discriminatory pictures. Given that

the Fair Housing Act must be construed broadly to effectuate Congress' purpose to provide "for fair housing throughout the United States, 42 U.S.C. § 3601, it is clear that HUD's interpretation of Section 804(c) to apply to the discriminatory use of human models is reasonable and not contrary to clear congressional intent, and thus must be followed here. *Ragin v. The New York Times Co.*, 726 F. Supp. 953, 958-959 (S.D.N.Y. 1989) (holding that HUD regulations clearly support plaintiffs' claims that all-white advertising practices violate the Fair Housing Act), *appeal pending*, No. 90-7389 (2d Cir.); *Ragin v. Steiner, Clateman and Assocs.*, 714 F. Supp. 709, 713 n.3 (S.D.N.Y. 1989). *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

Petitioners also unjustly criticize the court of appeals for following the well-settled and unremarkable view that the legal standard in Section 804(c), prohibiting "any" type of real estate advertising that indicates a racial preference, should generally be applied on a case-by-case basis by the factfinder based on the reasonable reader's interpretation of the specific advertising at issue. Because the petitioners apparently object to the breadth of the standard chosen by Congress in Section 804(c), they believe the courts must impose non-statutory restrictions on their liability, such as a showing of discriminatory intent, to avoid chilling their purported First Amendment right to publish lucrative real estate ads that exclude black models.

This Court, however, has already squarely rejected such a First Amendment argument. In *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), this Court upheld, over the newspaper's First Amendment challenge, an employment discrimination ordinance that prohibited newspapers from carrying "help-wanted" advertisements in sex-designated columns. The Court found that such an advertising format "signaled" that the advertisers were "likely" to show an il-

legal preference in hiring, even though the ads were discriminatory only by "implication" and not "overtly." 413 U.S. at 387-389. Just as the Court found that the employment advertising published in sex-designated columns could lead readers to believe that they would be discriminated against if they were to apply for the advertised positions, so here the all-white advertisements used by petitioners send a "signal" to readers that they are "likely" to encounter illegal discrimination if they visit the complexes advertised.

Moreover, petitioners forget that their ads are merely commercial speech. As the Court has recently emphasized, " 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' " *Board of Trustees v. Fox*, 109 S.Ct. 3028, 3033 (1989). For this reason, petitioners' arguments based on the alleged "chilling effect" of prohibiting racially exclusive human model advertising are of no moment when applied to commercial speech. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976) ("Since advertising is the *sine qua non* of commercial profits, there is little likelihood of it being chilled by proper regulation and foregone entirely."); *see also Riley v. Nat'l Federation of the Blind of North Carolina*, 487 U.S. 781, 796 n.9 (1988) (noting that "[p]urely commercial speech is more susceptible to compelled disclosure requirements").

Even if the commercial speech at issue here were deemed to promote lawful activity rather than unlawful discrimination in housing, such speech could still be restricted as long as the government's interest were substantial and the restriction imposed reflected a reasonable fit between the legislative goal and the means chosen to accomplish that objective. *Fox*, 109 S.Ct. at 3035.

Of course, the government's interest in the prevention and elimination of racial discrimination in housing is not merely "substantial," but "compelling." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-444 (1968). Section 804(c) and HUD's implementing regulations directly advance that compelling interest by outlawing real estate advertising indicating a racial preference in the selection of tenants or buyers, and are thus consistent with the First Amendment.

Nor is there any authority for petitioners' complaint that the reasonable reader standard adopted by the court of appeals is too vague under the First Amendment. Just last Term, this Court held that even with respect to an editorial in the newspaper, the legal standard for determining whether the newspaper is liable for defamatory opinions is "whether reasonable readers would have actually interpreted the statement as implying defamatory facts." *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695, 2710 n.3 (1990) (Brennan, J., dissenting) (stating unanimous aspect of decision); *id.* at 2707 (majority opinion) (test is whether statement "reasonably implies" defamatory facts or contains "false connotations"). This reasonable reader standard, which newspapers must follow in publishing opinions about matters of public concern, is no more standardless or difficult to apply than the reasonable reader standard applied by the court of appeals to determine liability for commercial speech.

II. THE INTERLOCUTORY DECISION BELOW REMANDING THE CASE FOR DISCOVERY AND TRIAL IS NOT WORTHY OF SUPREME COURT REVIEW BECAUSE NEITHER THE FACTUAL RECORD NOR THE LEGAL ISSUES HAVE BEEN PROPERLY DEVELOPED

Having lost their narrow statute of limitations defense on appeal, petitioners now ask this Court to consider statutory and constitutional issues under the Fair Housing Act that were not addressed by the court of appeals and that may be unnecessary to resolve. Because the court of appeals merely remanded the case for discovery and trial, there is no reason for this Court to consider this case at this time, especially when there are no contrary circuit precedents.

Reluctance to review interlocutory decisions is a time-honored principle followed by the Court in exercising its discretion to grant certiorari. Absent "extraordinary inconvenience and embarrassment in the conduct of the cause," this Court has traditionally declined to review decisions that do not finally resolve the litigation. *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893). Lack of finality is often by itself "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Thus, for example, the Court denied certiorari in *Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967), "because the Court of Appeals remanded the case, [and] it is not yet ripe for review by this Court."

The general rule against Supreme Court review of interlocutory decisions is especially compelling here because the petitioners raise constitutional issues which should not be ruled upon unless the case cannot be resolved on any other grounds. *See, e.g., Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568-569 (1947); *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis,

J., concurring). Not only may the constitutional issues become moot after trial, but this Court would not have the benefit of the prior consideration of the issues by a court of appeals if it now grants certiorari. The D.C. Circuit did not even address petitioners' First Amendment issues, while petitioner Colonial relegated its discussion of those issues to a single footnote in a 48-page brief on appeal.

Interlocutory review at this time would also deprive this Court of an adequate factual record. As noted above, there has not yet been any discovery and only the most preliminary facts are in the record concerning defendants' advertising practices.

Finally, this Court should deny certiorari in this case to give the Second and Sixth Circuits an opportunity to rule in the similar cases now pending in those jurisdictions. *See Ragin v. The New York Times Co.*, 726 F. Supp. 953 (S.D.N.Y. 1989), *appeal pending*, No. 90-7389 (2d Cir.); *Housing Opportunities Made Equal v. The Cincinnati Enquirer*, 731 F. Supp. 801 (S.D. Ohio 1990), *appeal pending*, No. 90-3176 (6th Cir). Even if there were a need for this Court to consider the issues raised by petitioners, the Court should allow the lower courts time to consider those issues first. *See, e.g., Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J., commenting on a denial of certiorari) ("It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.").

CONCLUSION

For the foregoing reasons, this Court should deny the pending petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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Nos. 90-201, 90-202, 90-205

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COLONIAL VILLAGE, INC.,
Petitioner,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

MOBIL LAND DEVELOPMENT CORPOPORATION,
Petitioner,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

MARVIN J. GERSTIN and MARVIN GERSTIN ASSOCIATES, INC.,
Petitioners,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION AND SUPPLEMENTAL APPENDIX TO PETITIONS

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REPLY TO BRIEF IN OPPOSITION

Petitioners Colonial Village, Inc. ("Colonial"), Mobil Land Development Corporation ("MLDC"), Marvin J. Gerstin and Marvin Gerstin Associates, Inc. (collectively "Gerstin") submit this reply in response to the arguments raised by Respondents in their Brief in Opposition ("Br.Opp."). Additional pertinent materials from the proceedings below are included in the Supplemental Appendix ("S.App.").

A. The Four-Way Split in the Circuits Over the Effect of Partial Consolidation On Appellate Jurisdiction Is Properly Presented.

Respondents assert that the question of appellate jurisdiction raised by the Gerstin petitioners is without moment, since respondents filed two appeals, at least one of which gave the court of appeals jurisdiction.

It is the Gerstin argument, however, that when the first appeal, admittedly timely as to the Gerstin petitioners was dismissed without challenge from respondents, that case was over. The second appeal came too late, and the appellate court by that time had no jurisdiction over Gerstin.

Whether Gerstin's position prevails, unfortunately, depends on which federal judicial circuit the case arises in, and which of four competing approaches to the effect of partial consolidation is followed in that circuit. (Gerstin Pet. 10-13). The reason certiorari should be granted is because the outcome ought to be the same nationwide.

In its one-paragraph treatment of the issue, respondents' brief asserts, in essence, that simply because respondents filed separate notices of appeal after each district court ruling, no issue of appellate jurisdiction exists. (Br.Opp.8, ¶11).

That argument begs the question.

The district court's May 22, 1987 judgment fully and finally resolved every claim asserted in Civil Action 86-3196 against Gerstin. Under the first and second approaches described in the Gerstin Petition, pp. 10-11, the

partial consolidation of that case with the Colonial case (which was not then finally resolved) did not affect the time for appeal as to Gerstin. If the first notice of appeal was not premature in the Gerstin case, then the D.C. Circuit's dismissal of that appeal in April 1988 (App.B, 23a), when left unchallenged, terminated the case for Gerstin. A second notice of appeal, filed seven months later in November 1988, could not save or resurrect the appellate court's jurisdiction.

Not only is this case a proper vehicle to review the conflict among circuits, but this is a proper and timely point for this Court to review the D.C. Circuit's determination of the issue.

The court of appeals has squarely addressed the point, and no further illumination will come out of requiring Gerstin to go through the uncertainty and expense of trial. Under the circumstances, it would be a flagrant waste of time, effort, money and judicial resources to require a trial and yet another appeal on the same point, to an appellate court that has already spoken on the subject, in order to present that question for review by this Court. This is the appropriate time and case to resolve an important and properly presented issue of federal jurisdiction, which continues to divide the circuits.

B. The Issue of Noncompliance With Federal Rule 4, Governing the Form and Service of Summons, Is Properly Presented

Respondents, implying that the service of process issue raised by MLDC is not ripe for review, argue that the court of appeals did not really allow the district court to assert jurisdiction over MLDC. (Br.Opp.7). However, the district court had already held that it had jurisdiction. The appellate court's failure to require dismissal because of the inadequate service has, in effect, condoned a legally erroneous view of the requirements of Fed.R.Civ.P. 4. Rule 4(j) strictly mandates dismissal unless valid service was made within 120 days (absent good cause shown), and respondents had the burden of proof to establish timely

compliance. *Light v. Wolf*, 816 F.2d 746, 751 (D.C. Cir. 1987).

It is the position of MLDC that allowing service of process directed to a co-defendant subsidiary ever to suffice as the basis for asserting in personam jurisdiction over the parent corporation directly contravenes the teaching of *Omni Capital International v. Rudolph Wolff & Co.*, 484 U.S. 97 (1987), and the specific requirements of Rule 4. Significantly, respondents do not contest this point in their opposition brief. Respondents also do not dispute the importance of this issue of federal jurisdiction and procedure, as discussed in MLDC's petition (pp. 17-18), nor do they disagree that the rulings below conflict with *Gottlieb v. Sandia American Corp.*, 452 F.2d 510 (3rd Cir.), *cert. denied*, 404 U.S. 938 (1971), and decisions in other circuits.

This is an appropriate time to review the Rule 4 issue. If the district court on remand does not withdraw its earlier ruling (App.H, 47a-48a), MLDC will be forced to litigate the entire case, then appeal and possibly seek certiorari, just to obtain a proper ruling that *in personam* jurisdiction was never established in the first place. The issue is an important one, squarely presented, and should be accepted for review.

C. The D. C. Circuit's Application of Havens Needs Reexamination By This Court.

Respondents' primary argument is that the decision below correctly applied the "continuing violation" doctrine of *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). (Br.Opp.9-10). If true, it affirmatively demonstrates the need for review by this Court.

To support their position, respondents have seized on the ambiguous phrase "last asserted occurrence" used in the *Havens* opinion. *Id.*, 380-81. "Occurrence" may describe either a specific action or the passive result or consequence of action. In *Lorance v. AT&T Technologies*, 104 L.Ed.2d 961 (1989), the Court held that the mere appearance of adverse consequences flowing from earlier discriminatory conduct is not enough, and at least one

separate violative act within the limitations period must be established in order to invoke the continuing violation exception. If these three critical words from *Havens* mean something other than a discrete act in violation of law, they appear to be inconsistent with *Lorance*; if not, then the D.C. Circuit has misconstrued and misapplied *Havens*.[1] Either way, the Court should clarify this important issue concerning the judicially-created exception to the limitations statute enacted by Congress.

Since the petitions for certiorari were filed, the U.S. Court of Appeals for the Fifth Circuit has decided *Hendrix v. City of Yazoo City*, 911 F.2d 1102 (5th Cir. 1990), which petitioners believe to be supportive of their view of the law and in conflict with the D.C. Circuit's ruling. *Hendrix* says that a facially neutral act which gives effect to prior discrimination is not covered by the continuing violation exception. *Id.*, 1104.

Both the trial court and the appellate court in this case indicated that the mere publication of one advertisement with only white models would be unlikely to make out a case of discriminatory advertising in violation of the Fair Housing Act. (App. A, 19a n.6; App. F, 36a-37a). Respondents claim that so-called "all white" advertising continued into the 180-day limitations period "by at least one day."[2] (Br.Opp.4). Petitioners believe the mere appearance of one facially neutral advertisement, where there is no evidence of intent to discriminate by deliberately excluding black models, is not the discrete discriminatory act within the limitations period that permits application of the continuing violation exception, either under *Havens* or under *Lorance*.

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[1] *See also Ragin v. Steiner, Clateman and Associates, Inc.*, 714 F.Supp. 709, 711-12 (S.D.N.Y. 1989), distinguishing *Lorance* and holding that date printed on newspaper, rather than date on which advertiser placed order for ad, triggers limitation period.

[2] Respondents were aware of petitioners' advertising before that day, having filed complaints with the Department of Housing and Urban Development and the D.C. Office of Human Rights on April 24, 1986—182 days preceding the first lawsuit against petitioners.

It is clear, especially in light of *Hendrix*, that the continuing violation doctrine needs further clarification by this Court, as it is a recurring problem over which the circuits disagree and involves an important question of federal law.

D. Petitioners' Evidence Met Summary Judgment Requirements, and the Record Is Adequate For Review of the Legal Issues.

Respondents for some reason make a big point that their discriminatory advertising claims were sufficient to survive a Rule 12(b)(6) motion to dismiss.[3] (Br.Opp.10-12). The well-reasoned decision by District Judge Harold Greene did not hold that the complaints failed to state a claim but instead granted summary judgment, based on the facially nondiscriminatory nature of the individual ads together with the absence of any extrinsic proof of discriminatory intent or any statistical imbalance during the limitations period. (App.F, 38a-39a).

Contrary to respondents' theory (Br.Opp.15-16), the remand by the D.C. Circuit does not mean the issues are prematurely presented or unsuitable for review. The record made below was complete for summary judgment purposes and is adequate for decision by this Court. Numerous decisions of major import have been rendered by this Court in cases arising in a similar or identical procedural pos-

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[3] Respondents criticize petitioners for failure to bring to the Court's attention a regulation of the Department of Housing and Urban Development, 24 C.F.R. § 109.30. (Br.Opp.11-12). However, respondents' quotation of § 109.30 (Br.Opp.vii) is incomplete and misleading, omitting the key introductory paragraph which explains that "the Assistant Secretary will consider the implementation of fair housing policies and practices provided in this section as *evidence of compliance* with the prohibitions against discrimination in advertising. . . ." 24 C.F.R. §109.30 (1980) (emphasis added). The regulation, in effect, provides a "safe harbor" for advertisers who come under scrutiny by the Department and does not purport to apply in private litigation. *See* App.F, 39a. Respondents argued unsuccessfully below that the regulations established a mandatory quota system under which the models depicted in real estate advertising had to be proportionate to the racial makeup of the surrounding metropolitan area. That argument was properly rejected. (App.F, 35a).

ture.[4] The court of appeals has rendered its judgment on the issues presented,[5] and there is no compelling reason to defer review of the issues until all possible proceedings below are exhausted.

E. The "Counterstatement" Does Not Accurately Reflect the Proceedings and Establishes No Valid Reason To Deny Review.

Respondents in their "Counterstatement of the Case" make various assertions regarding the proceedings below and the state of the decisional record. (Br.Opp.2-8). These points are largely incorrect and do not warrant denial of review by this Court.

1. Respondents' recitation of the procedural history is inaccurate and misleading: (a) A considerable factual record was compiled in the district court through summary judgment procedures, including detailed factual affidavits and exhibits. (b) The district court never restricted discovery in any manner. (c) The district court's scheduling order (issued more than three months after the complaint was filed) did not address merely *preliminary* motions but established a clear deadline for "any and all dispositive motions by any party". (S.App.L, 59a). (d) Respondents filed their own dispositive motion within the deadline and clearly knew the import of the district court order. (S.App. M, 62a). (e) Attorney William Jeffress' Rule 56(f) affidavit,

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[4] *See e.g., Havens Realty Corp. v. Coleman, supra* (addressing continuing violation and standing issues in Fair Housing Act case before discovery and final judgment); *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (certiorari granted to review appellate decision remanding Title VII case dismissed by district court as untimely); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977) (same); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986)(certiorari granted after D.C. Circuit reversed summary judgment for defendants); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (same); *Lujan v. National Wildlife Federation*, 111 L.Ed.2d 695 (1990) (certiorari granted and D.C. Circuit ruling upholding plaintiff's standing reversed prior to trial or final judgment).

[5] The First Amendment issues were extensively briefed by both sides below. Colonial adopted by reference the argument made in Gerstin's brief rather than repeat the points needlessly. (S.App.N, 69a).

indicating only a generalized need for discovery regarding speculative and peripheral matters (*Id.*, 62a-63a), was insufficient to postpone consideration of the pending motions in light of the scheduling order and respondents' failure to initiate discovery of any kind.[6] (f) The record contains all competent evidence the parties saw fit to submit on the cross-motions for summary judgment.

2. The fact that respondents sought no factual discovery is attributable singly to their own litigation strategy. During seven months while the district court litigation was pending, respondents had ample opportunity to initiate discovery but made no effort to do so. Respondents never addressed pre-1985 advertising, and they led the court of appeals to believe the only periods at issue were from January, 1985 to April or May, 1986. (App.A, 20a).

3. The complaints filed by respondents specifically dealt with advertising which appeared "during the past 180 days, and prior thereto". (S.App.M, 60a). Petitioners established that "no conceivable violation" occurred in the limitations period. (App.F, 39a). Respondents' statement that petitioners did not primarily address the merits below is incorrect. Petitioners indeed did introduce competent evidence to disprove any practice of deliberately "excluding" black persons from their advertising. (App.I, 50a-53a).[7]

4. The district court obviously did not agree with respondents' interpretation of *Havens*. Without evidence

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[6] *See United States v. Bob Stofer Oldsmobile-Cadillac, Inc.*, 766 F.2d 1147, 1152-53 (7th Cir. 1985); *Paul Kadair, Inc. v. Sony Corporation of America*, 694 F.2d 1017 (5th Cir. 1983).

[7] Counsel's representation that respondents offered to settle their claims "for $3,000 or less" including fees and costs (Br.Opp.3 n.2) is inaccurate. No such offer was ever received by petitioners. On the contrary, the record shows that respondents' attorneys demanded $10,000 or more to settle with Gerstin prior to litigation. (S.App.M, 61a-62a). In any event, demanding only $1000 to $3000 from each of the 80 or more targets of respondents' boilerplate administrative complaints filed in the District of Columbia, at peril of being sued in federal court, demonstrates the potential for strike-suit abuse. *See also* Gerstin Pet. 20-21 n.5.

that a discrete violation of law occurred within the 180-day limitations period, it found no basis for waiving the statutory bar to respondents' pre-limitations period claims. Petitioners do not disagree that the entire question of how and under what circumstances the continuing violation exception should apply definitely needs clarification, if not plenary reexamination.

5. Colonial's brief to the D.C. Circuit argued that the district court correctly held that a Fair Housing Act advertising claim required *either* an obvious message of discrimination or proof of "extrinsic circumstances which implicate a discriminatory intent." (S.App.N, 69a-70a). Colonial's position before this Court is the same, and there is no basis to suggest its argument was ever waived. The fact is that respondents made no effort to prove the existence of discriminatory intent, and Colonial proved there was none. Judge Greene found Colonial's ads were not facially discriminatory and entered summary judgment for it.

6. Faced with Colonial's properly supported motion, respondents had to present "specific facts" showing a triable issue as to at least one affirmative violation within the limitations period, in order to invoke the continuing violation doctrine and escape summary judgment. Fed.R.Civ.P.56(e); *Celotex Corp. v. Catrett, supra*, 477 U.S. at 323. All they could point to was one advertisement, showing a white couple, which appeared in the *Washington Post* on Saturday, April 26, 1986—the 180th day preceding their lawsuit. As a matter of simple logic, that was not enough. Petitioners provided no evidence that Colonial took any specific action within the limitations period, and no inference of such action could fairly be drawn. Colonial's petition does not misstate the facts but simply points out the factual and logical shortcomings of respondents' proof and the D.C. Circuit's analysis.

7. Colonial's description of the individual plaintiff's standing allegations is virtually identical to the court of appeal's description. (App.A, 9a n.2). Even as character-

ized by respondents (Br.Opp.6), those allegations were not sufficient at the threshold to establish standing. *Lujan v. National Wildlife Federation, supra; Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

8. Standing was explicitly raised and briefed in *Spann v. Gerstin*, Civil Action No. 86-3196. (S.App.M, 61a, 64a-65a). Respondents replied with legal arguments supporting Professor Spann's standing based on the allegations of their initial pleadings—nowhere suggesting any need for amended pleadings or further development of the record. (S.App.M, 63a-64a). Since the Gerstin case was consolidated for purposes of briefing with *Spann v. Colonial Village, Inc.*, Civil Action No. 86-2917 (S.App.L, 59a), there was no reason for Colonial to repeat Gerstin's points as to the individual plaintiff's lack of standing. The court of appeals also consolidated the two parallel appeals before it, and Gerstin continued to emphasize the standing problem in that forum. (S.App.N, 66a-68a). Respondents again fully briefed this issue—again not suggesting any need to amend their pleadings or supplement their evidence. (*Id.*, 70a-72a). Instead they argued that merely seeing the ads, thereby suffering deprivation of the right to "non-preferential advertising", was enough by itself to confer standing. (*Id.*). In view of the consolidation of these appeals there again was no need for Colonial separately to brief the same issue. (S.App.K, 57a). In short, Colonial never waived its right to object to the individual plaintiff's lack of standing.

9. The district court record contains ample and compelling evidence that MLDC was never properly served. (App.I, 53a-55a). If the record is "thin", it is so only in regard to the complete absence of evidence to support respondents' position. In noting that no more than a Colonial executive's business card was cited to connect MLDC to the forum (App.A, 17a), the court of appeals should have dismissed it from the suit at once. It was up to the respondents to prove the adequacy of their purported service of process. Having failed to do so, they have no right

to demand that MLDC participate in any judicial proceedings. The court of appeals suggested that discovery might be permitted on remand "concerning the character of Colonial's advertising and affiliations with MLDC" (App.A, 18a), but such discovery is irrelevant and would lend no new insights to the fundamental defects in the form and service of the summons raised in MLDC's petition.

10. In the court of appeals, respondents did not specify as an issue presented for review any alleged error in the district court's holding that their efforts to serve process directly on MLDC were ineffective. (S.App.N, 66a). MLDC specifically pointed out that the district court's ruling that MLDC was never directly served "has not been challenged on appeal" (S.App.N, 70a n.18). Respondents did not thereafter state any disagreement, nor did they make any argument for the validity of their attempts to serve MLDC directly. (S.App.N, 72a).

11. Respondents miss the point in their brief discussion of the appellate jurisdiction issue. Once the first appeal was erroneously dismissed as to Gerstin, that case would have been over under the approach of at least five judicial circuits, unless respondents took some prompt action to preserve their rights of appeal. Respondents do not disagree that the circuits are in sharp conflict over the effect of partial consolidation in the trial court. Proper resolution of that question controls whether the D.C. Circuit had jurisdiction of respondents' second appeal against Gerstin.

12. Petitioners did not discuss the HUD regulation on Fair Housing Advertising, 24 C.F.R. § 109.30, because it is not relevant. *See* note 3, *supra*. The court of appeals did not find respondents' reliance on the regulation important enough to mention, and the district court considered and rejected respondents' contention as wholly insubstantial. (App.F, 35a-36a).

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7118

Girardeau A. Spann, *et al.*,

Appellants

v.

Colonial Village, Inc., *et al.*

No. 87-7119

Girardeau A. Spann, *et al.*,

Appellants

v.

Marvin J. Gerstin, *et al.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED JUNE 30, 1987
GEORGE A. FISHER
CLERK

ORDER

It appearing that above captioned cases may have the same or similar issues, it is

ORDERED, *sua sponte*, that these cases are hereby consolidated.

SUPPLEMENTAL APPENDIX K

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7257

Girardeau A. Spann, *et al.*,

Appellants

v.

Colonial Village, Inc., *et al.*

No. 88-7260

Girardeau A. Spann, *et al.*,

Appellants

v.

Marvin J. Gerstin, *et al.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED JAN. 5, 1989
CONSTANCE L. DUPRE
CLERK

ORDER

It is ORDERED *sua sponte*, that the above captioned cases are hereby consolidated.

SUPPLEMENTAL APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2917

Girardeau A. Spann, *et al.*,

Plaintiffs,

v.

Colonial Village, Inc.,

Defendant.

Civil Action No. 86-3196

Girardeau A. Spann, *et al.*,

Plaintiffs,

v.

Marvin J. Gerstin, *et al.*,

Defendants.

Civil Action No. 86-3268

Girardeau A. Spann, *et al.*,

Plaintiffs,

v.

Howard Bomstein, *et al.*,

Defendants.

Filed Jan. 30, 1987
Clerk, U.S. District Court
District of Columbia

ORDER

In light of the fact that the above-captioned cases are related as defined in Local Rule 405(a) of the Local Rules of this Court, the Court will consolidate these cases for purposes of briefing, and it will also establish a joint briefing schedule for dispositive motions in all three cases. Accordingly, it is this 30th day of January, 1987

ORDERED that the above-captioned cases be and they hereby are consolidated for purposes of briefing; and it is further

ORDERED that any and all dispositive motions by any party in the above-captioned cases shall be filed on or before February 22, 1987, and that failure to do so constitutes waiver of the right to file such motions; and it is further

ORDERED that oppositions to any dispositive motions shall be filed on or before March 10, 1987; and it is further

ORDERED tha replies to oppositions shall be filed within five days after service of the memorandum in opposition.

/s/
HAROLD H. GREENE
United States District Judge

SUPPLEMENTAL APPENDIX M

[EXCERPTS FROM DISTRICT COURT RECORD]

COMPLAINT [Civil Action 86-2917]

* * *

4. Plaintiff Girardeau A. Spann is a black resident of the District of Columbia who has been looking for housing in the District of Columbia metropolitan area during the period covered by this Complaint.

* * *

13. During the past 180 days, and prior thereto, plaintiff Girardeau A. Spann viewed real estate display ads published in *The Washington Post* including those of Colonial Village and was offended by those ads due to their clear indication of racial preference.

14. On April 24, 1986, plaintiffs filed an administrative complaint challenging Colonial Village's racially preferential advertisements. . . .

16. As a result of the racially preferential advertising appearing in *The Washington Post*, including Colonial Village's ads, plaintiff Girardeau A. Spann has incurred indignation, distress and deprivation of his rights to nonpreferential advertising and to obtain housing on an equal basis with other persons regardless of race.

* * *

DEFENDANTS' MOTION TO STRIKE, SEAL OR EXPUNGE AND IN LIMINAE, MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Defendants, Marvin J. Gerstin and Marvin Gerstin Associates, Inc., by counsel, respectfully move for the reasons set forth in the accompanying memorandum and under F.R.C.P. Rules 12 and 56 that this Court:

* * *

2. Dismiss the Complaint due to the plaintiffs' lack of standing which deprives the Court of jurisdiction. . . .

* * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE, SEAL OR EXPUNGE AND IN LIMINAE, MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

* * *

V. PLAINTIFFS LACK STANDING TO BRING THIS LAWSUIT

Both the individual plaintiff as well as the two organizational plaintiffs lack standing to bring this lawsuit.

* * *

Here, the only "distinct and palpable injury" alleged by plaintiff Spann has been the reading of *Washington Post* advertisements. Complaint ¶¶ 24 and 26.

* * *

AFFIDAVIT OF MARVIN GERSTIN

* * *

8. I was present at a conference at the District of Columbia Office of Human Rights where plaintiffs' attorneys stated that from $1,000.00 to $3,000.00 attorneys fees were being required as part of each settlement with the 80 respondents in the case that plaintiffs had filed before the Office. In special cases such as mine, additional attorneys fees would be required to settle the case. In my presence, my attorney asked plaintiffs' counsel Rory Little, Esq. and Kerry Scanlon, Esq. the hourly basis of plaintiffs' fee claim. Mr. Little and Mr. Scanlon refused to provide the information. At the conference, plaintiffs' counsel said that Marvin Gerstin Associates, Inc. would have to pay

attorneys' fees in the five figures to settle the case. More recently, I have received a written demand, through my attorney, from Mr. Little demanding attorney's fees of $3,000.00 plus $7,000.00 for an alleged breach of a prior agreement. * * *

[Execution date December 15, 1986]

DECLARATION OF WILLIAM H. JEFFRESS, JR., ESQ. PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56(f)

* * *

2. Plaintiffs' actions against the defendants in Civil Action No. 86-2917 and Civil Action No. 86-3196 were filed on October 23, 1986 and November 20, 1986, respectively. The defendants in CA No. 86-3196 subsequently filed a Motion to Dismiss or for Summary Judgment asserting numerous threshold objections to plaintiffs' claims for relief, including defenses based on the First Amendment, the statute of limitations and standing. Recognizing that plaintiffs' claims in CA No. 86-2917 were closely related and that defendants in that action might raise similar legal defenses, the Court consolidated the actions and established a joint briefing schedule. Pursuant to that briefing schedule, Colonial Village, a defendant in CA No. 86-2917, also filed a Motion to Dismiss, For Judgment on the Pleadings, or For Summary Judgment.

3. In light of the preliminary but potentially dispositive objections raised by defendants, plaintiffs have devoted their limited legal resources to preparing an adequate factual and legal response and presenting their own Motion for Summary Judgment. . . . Although plaintiffs have been able to identify some of Gerstin's ads on information and belief, discovery is necessary for plaintiffs to identify and verify all Gerstin's ads. Plaintiffs will also seek to discover further evidence, in addition to defendants' responsibility for all-white human model ad campaigns and the long-

standing HUD regulations warning against this type of advertising, that defendants acted with willful and wanton disregard for plaintiffs' statutory rights.

4. As a result of the above, plaintiffs are not in a position at this time to present numerous facts in the exclusive control of defendants, concerning, for example, the identity and content of all Gerstin's advertisements, and the intent and ill will of defendants in publishing all-white human model ad campaigns.

* * *

[Dated March 16, 1987]

CORRECTED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS, FOR JUDGMENT ON THE PLEADINGS, AND FOR SUMMARY JUDGMENT

For this case to meet the Article III "case or controversy" requirement, this Court need only find that one plaintiff has demonstrated standing. [Citations omitted] In this case, however, all the plaintiffs have standing. . . .

A. Professor Spann's Standing As An Individual

Professor Spann clearly has standing in this case and only Gerstin raises any question on this point. The Complaints allege that Professor Spann, a black person in search of housing in the Washington area, suffered "indignation and distress" when he saw the "clear indications of racial preference" in the defendants' advertisements. Gerstin Complaint ¶¶ 24, 26; Colonial Village Complaint ¶ 16. Accepting the allegations in the Complaints as true, the defendants' all-white housing advertisements "stigmatiz[e]" blacks as "innately inferior" when they suggest that blacks are unwelcome as prospective purchasers. Such "stigmatizing injury" has been held to constitute a serious non-economic injury sufficient to confer standing. [Citations omitted] Moreover, Fair Housing Act was passed

specifically to "eliminate the humiliation and social cost of racial discrimination." [Citation omitted]. . . .

Professor Spann has also suffered a "deprivation of his right to non-preferential advertising and his right to obtain housing on an equal basis with other persons regardless of race." . . . This provides an additional and independent injury conferring standing. Even where no injury would otherwise exist, the Supreme Court has held that the "actual or threatened injury required by Art III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Warth*, 422 U.S. at 500 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). Section 3604(c) of the Fair Housing Act establishes an enforceable right to "advertisement[s] with respect to the sale or rental of a dwelling" that do not "indicate any preference, limitation, or discrimination based on race." 42 U.S.C. § 3604(c). By virtue of defendants' racially preferential advertising, Professor Spann has suffered injury in precisely the form the statute was intended to guard against," and has standing to challenge those unlawful practices. . . .

* * *

GERSTIN DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, FOR JUDGMENT, AND FOR SUMMARY JUDGMENT

* * *

VIII. PLAINTIFFS CANNOT HAVE STANDING WITHOUT INJURY

It is important to note what plaintiffs do not allege:

1. There is no allegation that any plaintiff . . . has been misled by any of defendants' advertising, believe or have been led to believe by the defendants or anyone else that they are not entitled to rent or purchase housing wherever they choose.

2. There is no allegation that any of the real estate projects advertised by these defendants discriminate in any way.

3. There is no allegation that any plaintiff . . . has even had an interest in living in the real estate projects advertised.

4. There is no allegation that any of the real estate developments advertised are not fully integrated.

5. There is no allegation that the neighborhoods or communities where the advertised real estate projects are located are not fully integrated.

Plaintiffs' complaint is that they don't like what they read in the newspaper.

Because of what he didn't see in the newspapers—enough black models—Professor Spann has hurt feelings. * * *

While damages for emotional distress may flow from a discrimination injury, there must first be such injury. Here, plaintiffs have suffered no legally cognizable injury.

Under plaintiffs' legal theories, every resident or potential resident of the Washington Metropolitan area would have standing to sue and every reader of the newspaper would, like Professor Spann, be able to recover for his offense to real estate advertisements that he believes to be underinclusive of his or her protected group.

* * *

SUPPLEMENTAL APPENDIX N

EXCERPTS FROM COURT OF APPEALS RECORD, Nos. 88-7257, 88-7260 (Consolidated Appeals)

APPELLANTS' BRIEF

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does a challenge to a longstanding practice of publishing all-white human model real estate advertising state a claim under Section 3604(c) of the Fair Housing Act, given HUD's interpretation that all-white advertising falls within the prohibitions of that Section?

2. Did the district court contravene the "continuing violation" rule established in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), by finding these complaints untimely, notwithstanding that plaintiffs alleged a longstanding discriminatory practice that continued into the limitations period?

3. Did the district court err in holding that the plaintiffs must provide evidence of discriminatory intent to prove a violation of Section 3604(c)?

4. Do the 1988 Amendments to the Fair Housing Act apply to plaintiffs' claims, thereby providing them full remedies equivalent to those provided by the Civil Rights Act of 1866?

* * *

BRIEF FOR APPELLEES MARVIN GERSTIN ASSOCIATES, INC. AND MARVIN GERSTIN

* * *

VI. THE PLAINTIFFS LACK STANDING

The Gerstin defendants raised other grounds below that also support the District Court's ruling. One of the most

important is the fact that the plaintiffs lacked standing to bring this action.

It is important to note what plaintiffs do *not* allege:

1. There is no allegation that any plaintiff . . . has been misled by any of defendants' advertising, believe or have been led to believe by the defendants or anyone else that they are not entitled to rent or purchase housing wherever they choose.

2. There is no allegation that any of the real estate projects advertised by these defendants discriminate in any way.

3. There is no allegation that any plaintiff . . . has ever had an interest in living in the real estate projects advertised.

4. There is no allegation that any of the real estate developments advertised are not fully integrated.

5. There is no allegation that the neighborhoods or communities where the advertised real estate projects are located are not fully integrated.

Plaintiffs' complaint is that they don't like what they read in the newspaper. Because of what he didn't see in the newspapers—enough black models—Professor Spann has hurt feelings. . .

While damages for emotional distress may flow from a discrimination injury, there must first be such injury. Here, plaintiffs have suffered no legally cognizable injury.

Under plaintiffs' legal theories, every resident or potential resident of the Washington Metropolitan area would have standing to sue and every reader of the newspaper would, like Professor Spann, be able to recover for his offense to real estate advertisements that he believes to be underinclusive of his or her protected group. . . .

Under Article III of the United States Constitution, in order to establish standing to sue in a federal court a

litigant must satisfy a three-part test. He must show (1) that he has suffered a personal injury, (2) that the injury is fairly traceable to the defendant's alleged conduct, and (3) the injury is likely to be redressed by the judicial relief sought. . . .

The injury alleged must be "distinct and palpable. . . " [Citation omitted] "[A] litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.' " *Id.*

Here, the only "distinct and palpable injury" alleged by plaintiff Spann has been the reading of *Washington Post* advertisements. . . .

* * *

BRIEF FOR DEFENDANTS-APPELLEES COLONIAL VILLAGE INC. AND MOBIL LAND DEVELOPMENT CORPORATION

* * *

Again plaintiffs must rely on a *per se* violation theory. . . . Their case boils down to a claim that six prototype ads, each depicting one or two persons, which were run sporadically in the newspaper over a period of 16 months, violated the federal anti-discrimination law solely because none of the individuals shown happened to be indentifiable as a black person.

Without showing more, plaintiffs cannot prevail under section 804(c). As District Judge Greene observed, the *per se* theory is illogical, among other reasons because it would prohibit developers from using a single prototype ad, showing a single white person but no black person, without the slightest evidence that the ad is discriminatory in effect or intent. . . . The practical consequences of adopting plaintiff's view, some of which are described in the district

court's opinion, make it most unlikely that Congress intended such a result.[12]

* * *

3. The District Court Did Not Impose Any Requirement That Plaintiffs Prove Discriminatory Intent To Establish Their Claim Under Title VIII

Plaintiffs berate the district court for supposedly imposing a burden on plaintiffs in all Title VIII cases to prove discriminatory intent. . . . District Judge Greene is portrayed as "the only federal judge who believes that intent is required to be shown" in these cases. . . . However, Judge Greene made no such holding. The gratuitous attack by plaintiffs, taking his words out of context and distorting their plain meaning, is irrelevant and unnecessary to the appeal.

What the district court actually said was that a violation of section 804(c) may be established *either* by proof of an "obvious" message of discrimination conveyed in the ad *or* by proof of extrinsic circumstances which implicate a discriminatory intent and message in advertising. This approach is entirely consistent with prevailing jurisprudence under Title VIII, including the "disparate impact" doctrine. [Citation omitted] The issue of intent creates no basis for reversal, since plaintiffs were not required and did not try to establish intent in this case. [Footnote omitted]

Plaintiffs elected to forego pursuit of the second alternative approach described by Judge Greene and to focus exclusively on what they contend is "obvious" discrimination, based simply on the race of individuals pictured in the challenged advertising. Deliberately framing this as a

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[12] In addition, plaintiffs' interpretation of section 804(c) would raise serious First Amendment problems, as the district court noted. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). This concern is to be addressed more fully in the Gerstin appellees' brief.

test case of their *per se* theory of liability, they made no effort to prove that the advertising actually had any disparate effects on readers or that it was racially motivated. The district court found, according to the proof, that neither obvious discrimination nor an intent to indicate a racial preference existed in Colonial Village advertising during the limitations period. (J.A. 156). This finding is supported by undisputed evidence and is not challenged in this appeal.

* * *

Mobil Land Development Corporation moved for dismissal of the complaint under Rule 4(j) on grounds that it was not served within 120 days. The district court ultimately denied that motion and held that MLDC was effectively served, based on two factors: (1) MLDC's awareness of the litigation; and (2) the previous accomplishment of service on MLDC's wholly-owned subsidiary, Colonial Village, Inc. (J.A. 173-174).[18]. . .

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APPELLANTS' REPLY BRIEF

* * *

THE PLAINTIFFS HAVE STANDING

As the Supreme Court has made clear, the "sole requirement" for standing under the Fair Housing Act "is the Art. III minima of injury in fact," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982), a requirement satisfied here by each plaintiff. [Footnote omitted]

Mr. Spann viewed defendants' all-white real estate ad campaigns appearing in *The Washington Post*, and as a result suffered a deprivation of his statutory right "to nonpreferential advertising." . . . This injury to his statutory

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[18] The district court expressly found that all other attempts to serve MLDC were invalid, and this ruling has not been challenged on appeal.

right, *by itself*, is plainly sufficient to confer standing under the Fair Housing Act. As the Supreme Court has repeatedly recognized, "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " [Citations omitted] Section 3604(c) creates such a right of standing to challenge discriminatory housing advertisements. The Supreme Court has held that even a "tester," who has no "intention of buying or renting a home," and who was acting for the purpose of gathering information to support litigation, has standing to pursue violations of Section 3604(d) of the Act prohibiting untruthful information about the availability of housing. *Havens Realty*, 455 U.S. at 374. "Just as the tester in *Havens Realty* suffered a statutorily recognized injury when he received an unlawful representation, so did [Mr. Spann] receive an injury under the Act when [he] received an unlawful advertisement indicating a . . . preference based on race." [Citation omitted].[7]

* * *

Gerstin contends that this Court should disregard this basis for standing because "every reader of the newspaper, like Professor Spann, [would] be able to recover for his offense to real estate advertisements." . . . Although it is true that discriminatory newspaper advertising adversely affects many people, that is no reason to immunize such conduct from legal challenge. Otherwise there would not be a specific provision of the Fair Housing Act making

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[7] Mr. Spann also has standing because he was offended and distressed by the defendants' use of all-white advertising campaigns and their indication of racial preference. J.A. at 13, 22. He interpreted the absence of blacks from human model ad campaigns as a clear signal that the development so advertised did not want to sell to him or other black persons. *See* J.A. at 12, 22. The "stigmatizing injury" suffered by Mr. Spann as a result of viewing defendants' all-white ads constitutes a serious non-economic injury sufficient to confer standing. [Citation omitted]

illegal "newspaper advertisements indicating a racial preference." [Citation omitted]

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DEFENDANTS' PROCEDURAL ARGUMENTS HAVE ALREADY BEEN REJECTED BY THIS COURT

Remarkably, both groups of defendants attempt once again to raise the same procedural arguments already rejected by this Court, in yet another effort to delay or prevent a decision on this appeal. * * *

Each of the procedural arguments defendants now raise has already been weighed and rejected in a considered decision by a motions panel of this Court, which included Chief Judge Wald among its members. . . . While defendants argue that this Court is "not bound" by that decision, . . . defendants have not presented anything to show that this Court *should* revisit the panel's decision on these issues. * * *

The strongest rationale that might exist for reconsidering the motions panel's decision—that the "doctrine of 'law of the case' does not apply to the fundamental question of subject matter jurisdiction," [Citation omitted]—is absent in this case. Mobil and Colonial Village present only two arguments for dismissal on procedural grounds: The absence of a separate judgment under Rule 58; and service of process objections under Rule 4(j). Neither of these is the type of jurisdictional question that must be raised by the Court *sua sponte*. [Citations and footnote omitted]

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